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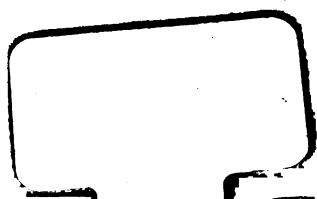
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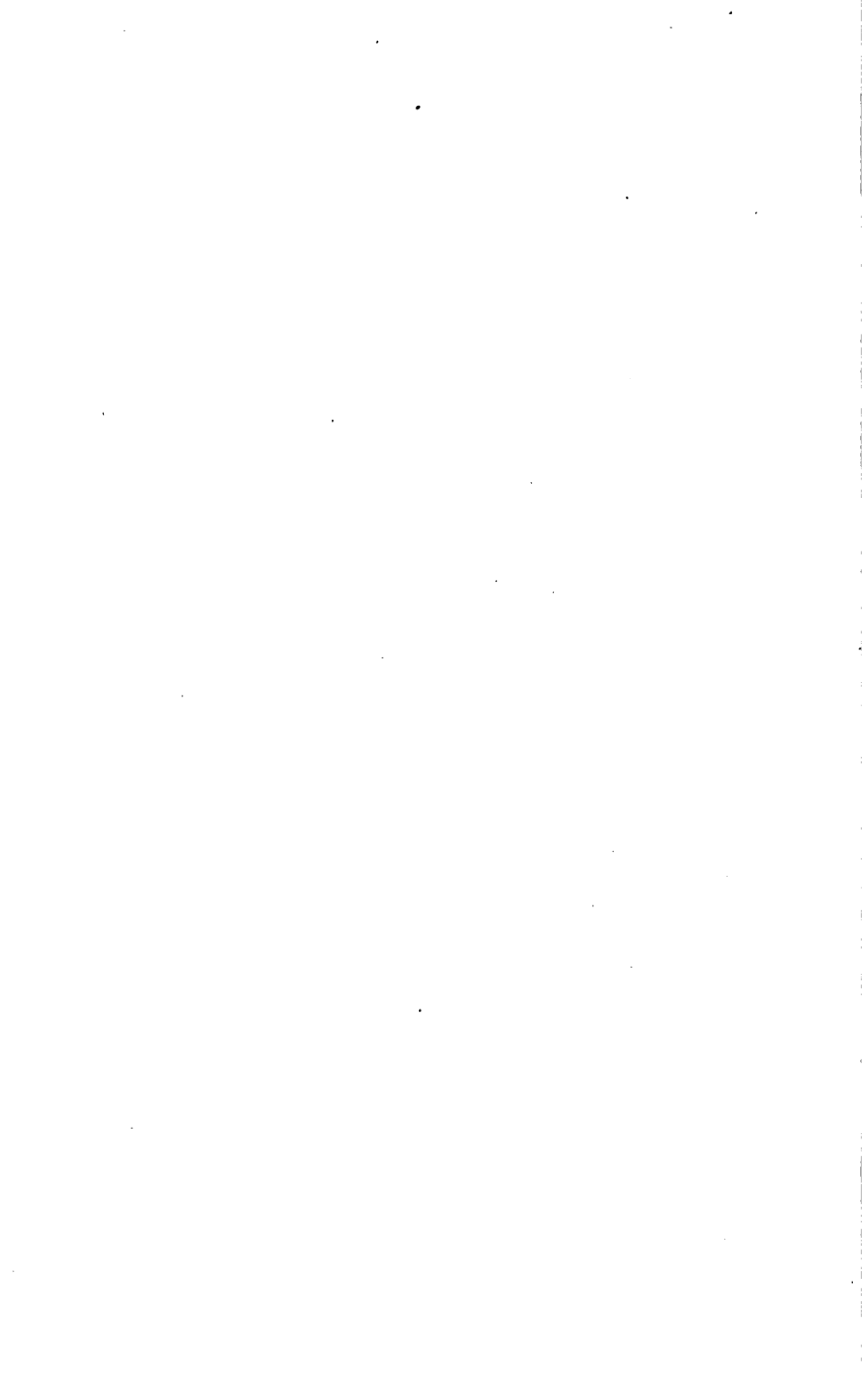
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TO THE BINDER.

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THE
LAW REVIEW.

ART. I.—LORD LANGDALE.

1. *Memoirs of the Right Honble. Henry Lord Langdale.* By THOMAS DUFFUS HARDY. In 2 vols. Bentley, 1852.

THIS work furnishes us with materials of much interest and instruction, especially to the Law Reformer, and we trust it will enable us to read a useful lesson to all public men who aspire to that name. We cannot compliment Mr. Hardy on that portion of these volumes which properly belongs to him. The papers, letters, and documents connected with the life of the late Master of the Rolls have been entrusted to him, and he has duly filed, noted, copied, and recorded them in order and date, and to all the praise that can be awarded to him in that capacity he is fairly entitled; but beyond this we cannot justly go. He has displayed a remarkable want of judgment in the insertion of many papers which it would have been more creditable to the memory of Lord Langdale to have omitted; he has filled his pages with trivial letters and journals which serve no purpose but to increase the bulk, and add to the expense of the book; he is frequently ill-informed and presumptuous in his remarks on the persons whose names he introduces in connection with his hero; and in many of his statements he sins not only against good taste, but is blundering and inaccurate to no small extent. He has, however, performed one good service; he has enabled us to estimate the real character of Lord Langdale, and to state the just obligation which the country owes to him. He is perhaps the less entitled to thanks for this, as he did not always know the true bearing of what he has given; he

sometimes prints a document with the intention of conferring honour, which to our minds has an effect precisely the reverse ; he means to praise, when in fact he gravely censures : he has neither the knowledge, nor the candour of a lawyer, nor the tact nor skill of a biographer ; but he has one merit,—he is a faithful transcriber of records, and he enables us to judge for ourselves, and for this we are obliged to him.

By means of these volumes, and of some little information of our own, we shall endeavour to give a faithful account of the life of Lord Langdale. Henry Bickersteth must always have a claim on Law Reformers ; and although, as we shall show, his character as such was far from perfect, yet as an able advocate, as an honourable and conscientious man, and, on the whole, an eminent judge, his life deserves from our hands a careful consideration ; but we shall not hesitate to point out his great defect, especially as this may afford some instruction to that numerous band of lawyers who are now fast rising around us, ambitious of the name of reformers of the law, and because Mr. Hardy has endeavoured greatly to mislead the public mind respecting him, and to place him in a position, with respect to his contemporaries, to which he is in no way entitled.

It will be necessary, in endeavouring to consider the real worth of Lord Langdale as a public man, and more especially as a reformer of the law, to consider what is due from such an one. The duty then of him who would achieve this fame is, laying all other things aside, to seek only how to serve this cause, and to make all things subservient to it. Wealth, rank, honours, and distinctions in this life, are easy sacrifices when a greater object is in view ; but the Law Reformer must learn to rise superior to slander and calumny ; he must look beyond the generation with which it is his lot to strive, and boldly claim from posterity that justice which the world in his own lifetime will never give him ; he must be content to make a sacrifice far more difficult, even his own present reputation, knowing, if he thinks about it, that a future time will restore to him all that he really deserves ; above all, he must be careless of present ease, and be willing to undertake

any difficulty or any responsibility, if he can but serve, or have a reasonable expectation of serving, the good cause ; he must shut his ears to the babble of human tongues, and give up his life to one object,—the lawful attainment of those reforms which, in his opinion, are needful for his country. In a word, he must forget himself, nor hesitate for a moment to run any risk which simply involves his own comfort, his own profit, even his own “fame, name, and reputation,” in this world.

This is the path and this the honour to which any one worthy of the name of a Reformer must aspire, but more especially the Law Reformer ; and this is the path which all eminent Law Reformers have run, or have attempted to run ; but to such an honour, assuredly, Lord Langdale can have no proper claim, and such a path, repeatedly presented to him, he as often avoided. On most occasions, as we shall show, he shrunk from action ; he failed not only in seizing the helm when it was offered to him ; but when it was forced upon him, he failed to guide the ship with zeal or firmness. He repeatedly set aside the great opportunities in his power of effecting great reforms, and he did not even use the lawful powers placed in his hands ; not only did he not go out of his way to gain greater strength, but he would not employ his ordinary ability ; he refused the larger means offered him of accomplishing the objects to which he professed to devote his life, and often tied his own hands into the bargain. Not once, but four or five times in his life, might he have greatly served the cause of Law Reform by undertaking lawful and reasonable responsibilities ; as many times did he neglect and refuse to serve it, justifying this conduct, now by some fancied slight, now by supposed ill health ; this time having too little power given him to fulfil his wishes, another time having too great responsibility and too little inclination. Selfishness we are bound to consider the predominant feature of Lord Langdale’s character. He saw clearly that great reforms were necessary ; he saw further what the alterations should be, and how they might be effected ; he felt he had the power to accomplish them ; all this repeatedly he saw and knew, but as the time drew nigh

for action he grew quite sick and faint. To talk of all that should be done,—to hint that he could do it,—to show that he had suggested it,—to lecture others on their duty,—all this he could do, but the thing itself he could not or he would not. How eloquently would he discourse over his tea and toast of all that should be done; how vigorous he was in South Street at breakfast; how valorous after dinner at Roehampton¹; but in the House of Commons he never ventured to take a seat, although repeatedly pressed, and offered one without trouble or expense; and in the House of Lords, when he took his seat, how languid, how inactive, how ineffective!

We are most unwilling to speak thus strongly, although we give only a faint view of the true state of the case; but when Mr. Hardy makes this feeble attempt to decry all other law reformers, living and dead, (for he does not even mention the name of ROMILLY, father or son,) and to exalt Lord Langdale as the light and landmark of Law Reform, we are bound to show the true value of his services, and it becomes our duty to say that if he had not lived at all this cause would have been practically just where it is. Thus much has Mr. Hardy, by his injudicious volume, forced from us. We shall now compress the facts which they contain and endeavour to justify, as well our praise as our censure, by giving a sketch of the life of this truly amiable and very estimable man.

Henry Bickersteth was born at Kirkby Lonsdale on the 18th of June, 1783, and was the third son of Mr. Henry Bickersteth of that place, surgeon, by Elizabeth, daughter of Mr. John Barry, of Kirkby Lonsdale. Another son, Edward, was the late eminent clergyman of this name.

¹ This warmth did not arise from any artificial source. Indeed Falstaff's advice might have been useful to the late Master of the Rolls:—"The second property of your excellent sherries is the warming of the blood, which before cold and settled left the liver white and pale, which is the badge of pusillanimity and cowardice; but the sherries warms it, and makes it course from the inwards to the parts extreme."—*Hen. IV. act 4. sc. iii.* We think, indeed, that it was a public misfortune that Lord Langdale took so much to thin potations. For many years before his marriage his chief delight, we apprehend, was taking tea with old ladies.

Young Henry had the inestimable advantage of a good mother¹, who implanted in his mind that regard for truth and integrity which was conspicuous in his life. This lesson was taught in small as in great things, as we shall see.

“As Henry and his brother John, when mere children, were returning one evening from a visit to their grandmother, they found in the road a large log of wood, which they dragged home with considerable difficulty, thinking it would make an excellent plaything.

“‘Where did you get it?’ asked their mother, as they triumphantly showed their prize.

“‘We found it in the road,’ was the reply. ‘Then it is not yours,’ she said; ‘so you must take it back again, and replace it where you found it.’”

“This lesson was never forgotten: Lord Langdale often related it in after years, and it probably passed through his mind when he adopted the significant and appropriate motto of ‘*sum cuique*.’” (Vol. i. p. 5.)

He was not only a truthful boy and man, but all his actions and letters show him to have been a tender and affectionate son and brother.

He was educated at the free grammar school of his native place under the tuition of the Rev. John Dobson. He was what is commonly called a popular boy.

“Though he was always (?)” says Mr. Hardy, “diligent in his studies and exact in his duties, yet he generally found time to enter into all the games and sports of his schoolmates: one of his favourite summer amusements was bathing in the picturesque river Lune, and he became so expert and daring a swimmer, that more than one boy was indebted to him for his life. In after days he used to talk of his school days, when football was a favourite game, and often gave occasion to broken shins. At the end of the field where they played football, was a railing, and on the other side of the railing was a precipitous descent to the river, and he

¹ An old Scotch woman gave the following advice to her son as to his choice of a partner in life: — “Jock, your gaun into toon, an ye’ll be looking oot for a joe; noo, my lad, ye may bring me the lass you like, but tak care of ae thing. Let her mither be an honest woman, and I don’t care though her faither is the deil himsel!”

said, to see the boys jump over the railing and roll down the descent after the ball was astonishing." (Vol. i. p. 9.)

He left school in the year 1797, and was apprenticed to his father, who had decided that he should be brought up to the medical profession, or, as he terms it, "enter the shop." After remaining at home a little more than a twelvemonth, his father sent him to London to finish his medical studies. He was accustomed to say to his sons, "Remember, boys, I shall not be able to leave you much worldly wealth, but I can give you a good education." If young Henry had a conscientious and sagacious mother, he also had, it must be admitted, a kind and indulgent father.

It now became desirable that Henry should determine for himself which branch of the medical profession he intended to pursue, and he was urged to do this by his father. This he professed himself unable to do, but resigned himself to his father's and mother's wishes. It is pretty obvious that he never had any relish for the medical profession. He was willing, however, to do his best to acquire a knowledge of it. On December 29th, 1800, writing to his father, he says, that the —

"Satisfaction felt on the recovery of a patient is by no means equal to the anxiety, nay even misery which a feeling mind may have previously experienced during his sickness; but this disproportion between pleasure and inconvenience appears nothing when we have added to the latter, the inconvenient hours at which a medical man is liable to be called,—the danger of catching infectious diseases (although it be small),—inadequate payment,—the difficulty of rising to any eminence in the profession,—the almost perpetual quarrels and jealousy of the professors, who frequently possess pedantry and self-sufficiency in proportion to their ignorance and want of experience."

The practice of the profession was evidently distasteful, the theory endurable:—

"For what reason," he says, "can be given why a man should not be an excellent physiologist without being either a physician or a surgeon?"

Not content with this, he thus cautions his younger brother, who was also about to enter the profession :—

“ Before Robert enters on the profession ask him if he could endure to have it said that he killed his patient after he had been taking every proper pains, and using every endeavour to save him, or to receive the praises of having saved his life when he was conscious of having used measures directly opposite to those which would have been right. Ask him if he can bear the idea of being chained down to his business every moment of his life, not an instant of time belonging to himself—not an hour in which several lives are not in absolute dependence on the clearness of his intellect, and the acuteness of his penetration.”

These doubts are freely communicated, and they show the kind and easy footing on which he stood with his father; but he still worked on, looking forward to the time when, in spite of all these difficulties, he might “ receive pleasure in the actual dispensation of health.”

It was at this period of his life that some doubt seems to have existed in his mother's mind as to his religious opinions, which according to Mr. Hardy, were the subject of “ much misconstruction all his life long,” (p. 25.) In the letter to his mother, in answer to her anxious inquiry, he admits that he “ has not very frequently the advantage of being able to go to church,” (*why* he does not say), but he adds :—

“ I see how beneficent and good the Creator has been to mankind, and I cannot but learn from this, as far as my nature will enable me, to be beneficent and good to my fellow creatures. I cannot, it is true, on all occasions profit by direct rules for my conduct, but I thank God and my parents that I have engrafted on my heart the *golden rule* of the Redeemer of the world; so long as this is uppermost in my thoughts (which I trust will be always) I can commit no moral wrong, nor at all deviate from the strict rule of right.” (P. 27.)

After this we think no one need doubt Lord Langdale's orthodoxy. We certainly could have wished, however, that he had shown his displeasure at the letter sent to him by Sir F. Burdett (printed vol. i. p. 329.), and which Mr. Hardy, with his accustomed want of taste, prints without a word of

comment. If familiar letters of this kind were read and answered in the same strain, we fear that the *golden rule* was often forgotten, and we can only express our surprise that Mr. Hardy should have thought it a part of his duty to print what can only excite disgust to all religious minds.

Whatever doubts Bickersteth felt as to his proposed profession, he still continued to pursue its study, and with this view he proceeded to Edinburgh, where he took lodgings in the house of one Jenkinson, No. 16. South Richmond Street, and became a member of the Royal Medical Society, a debating club, in which the subjects of discussion were usually either physiological questions or chemical, but in which philosophical subjects were also introduced; "members were allowed to bring their friends, and our informant remembers Henry Brougham among them and speaking in a discussion." Bickersteth also distinguished himself. "He was a remarkably good speaker, very energetic, yet eloquent. The same informant remembers his appearance, — that of a very handsome man, with brown hair, blue eyes, and a noble countenance."

He must have paid some attention to his studies, as in 1802 he was appointed Clinical Clerk to Dr. Duncan, one of the Edinburgh Professors, being selected "in the midst of a crowd of applicants."

From Edinburgh, still pursuing his medical studies, Bickersteth went to Cambridge, and was entered on the 22d of June, 1802, as an undergraduate at Caius College. In November he speaks to a friend thus modestly of his mathematical studies: —

"You ask me how I contrive to kill time in this place; perhaps you will be surprised to hear that I am working very hard at mathematics: Cambridge, you know, is every where celebrated for a knowledge of this kind, and whilst I am here I think it right to make use of it, for I have little doubt of its turning to good account in the end."

In another letter he says: —

"The first step towards a desire of instruction I hold to be being ashamed of our ignorance; and yet this is not to be carried too far, for then despair takes possession of the mind, and nothing

is done. When we once are anxious to learn, the next gradation is to ardour and enthusiasm; and after this, I apprehend acquirement is certain. 'Enthusiasm,' says Mr. Melmoth, 'in everything but religion is a beneficent enchantress, who never exerts her magic but to our advantage, and only deals about her friendly spells in order to raise imaginary beauties or to improve real ones.' *I am persuaded that nothing great or glorious was ever performed where this quality had not a principal concern."*

In the truth of this sentiment we quite agree, although we should not have looked for it as coming from the calm and placid temperament of Bickersteth, did not we know that under the snows of Etna glows the burning lava.

His severe application brought on a severe illness, from which he only slowly recovered. In March, 1803, he says, writing to his friend Dr. Henderson: —

"You will think me in a pitiable condition when I tell you I am unable to read attentively without a violent headache. By gradual exercise of mind, and taking care not to continue it too long, I hope to recover from this wretched affliction; but I am occasionally so vexed at this imbecility of mental power when I am completely well as to muscular strength, that I play the coward, and wish myself beyond that bourne whence no traveller returns: but these are silly notions. Juvenal was right to say, that it was the duty of a good citizen, '*Verba animi proferre et vitam impendere vero.*'"

The fact was, that intense application and severe discipline had so impaired his health, that rest and immediate change were absolutely necessary for its restoration. Fortunately about this time, Dr. Batty, a maternal relation, was requested by the Earl of Oxford to recommend him a physician to travel with his family in Italy. Henry Bickersteth was considered by his relation as fit for this duty, and he left London accordingly on the 31st of March, 1803.

In the discharge of this office he remained for some time; but his dislike to the medical profession seems to have been strengthened by this practical experience of it; and we find him, in February, 1805, writing to his friend Henderson thus: — "I can only say at present that my dislike to the practice of medicine has gone on so fast increasing, that I am

pretty far advanced in a resolution never more to have anything to do with it. (Vol. i. p. 212.)¹

He resolved, however, upon re-visiting Cambridge, but turned his thoughts towards the army, on the idea that Lord Oxford's interest might be exerted in his favour, and that thus he might obtain a standing in life. But the dissatisfaction of his parents and his own disappointment at only being able to obtain an ensigncy instead of a lieutenantcy, as he had expected, determined him to give up all thoughts of going into the army, and to adhere steadily to his studies at Cambridge. He now again applied himself to the studies of the place, and his contemporaries describe him as a "desperately hard student;" but he says, "Starkie is kind enough to assist me;" and many other kindred spirits watched over and aided him.

"I well remember the day in the winter of 1806 and 1807," says Professor Sedgwick, "when he was first pointed out to me striding rapidly behind our college for exercise. On these occasions he always wore his cap and gown. It was impossible to forget his rapid strides, his vigorous and active frame, his fine features, and his thoughtful look; but even then, his complexion was somewhat pale and sallow. He had the look of a man who was taxing his health by over-work in his study, and who was older than the average age of an undergraduate; and whenever he came to visit me all my friends were anxious to be invited, for he was one of the lions of the year. He had no reserve, but threw out his sentiments vigorously and brilliantly — his manners

¹ His residence with Lord Oxford led to one happy result. He there met for the first time Lady Jane Harley, the daughter of that nobleman, and the attachment was formed which afterwards ripened into a most happy matrimonial union, on the 17th of August, 1835. On this occasion, writing to his brother John, who had informed him of the intended marriage of his daughter, Mr. Bickersteth says:—

"You may be surprised, and perhaps amused, to hear that your letter arrived almost at the moment when I had made up my mind to commit matrimony myself; so there will be an old couple as well as a young couple recently made such in the family, for I am twice as old as your future son-in-law, and my intended is twice as old as Elizabeth. Lady Jane Harley is the person. I have known her since she was seven years old, now more than thirty years ago. The affair is but just settled, and the particular arrangements are not yet made, though they soon will be, as I have no time to dawdle." (Vol. i. p. 445.)

were firm and gentlemanlike, and in knowledge of the world he was greatly our superior. He had no apparent objection to any argument; and he knew how to listen to his opponent, and if he had to deal with a man who seemed to be defending whatever was mean or bad, he was not sparing in invectives. I have heard, that on one or two occasions at the Debating Society, his invectives and sarcasm were most overwhelming and withering." (Vol. i. p. 233.)

Dr. Paris, another of his contemporaries, says that he never saw him in his room that he was not reading Dante, or Alfieri, or some Italian poet.¹

On the 20th of January, 1801, Henry Bickersteth met the reward of all his labour, which he thus modestly announced in a letter to his brother John: —

"MY DEAREST BROTHER, — You will be very glad to hear that I have had the good fortune to become Senior Wrangler, in consequence of which my labours are now nearly over, though I shall be detained here a few days longer.

"The wine you sent me has not been unpacked, so that I do not know whether the bill is in the hamper — if it is not, I must thank you to send it by return of post, otherwise I shall not get the other men to pay their share. I have not time to say more.

"Ever yours,

"H. B."

To gain precedence of ordinary men requires no ordinary ability; but his opponents on this occasion were Miles Bland, of St. John's, the author of "Equation," as second wrangler; the third wrangler was the present Bishop of London; the fourth was White, also of Caius; the fifth, Sedgwick. Bickersteth was elected a Fellow of his college, and immediately after he left Cambridge for Kirkby Lonsdale, to visit his

¹ We may mention the same favour towards Italian poetry in a contemporary eminent lawyer and Law Reformer. Writing, Oct. 4. 1820, to the Bishop of Llandaff, Lord Dudley says: — "At half past twelve to-day Brougham concluded a most able speech with a magnificently eloquent peroration. The display of his power and fertility of mind in this business has been quite amazing, and these extraordinary efforts seem to cost him nothing. He dined at Holland House yesterday, and staid till eleven o'clock, talking '*de omni scibili*,' French cookery, Italian poetry, and so on, &c." — *Lord Dudley's Letters*, p. 268.

family. While there his thoughts turned to the Bar, and on the 8th of April, 1808, he entered himself as a student in the Inner Temple; and in 1810 he became a pupil of John Bell¹, who was, like himself, a native of Westmoreland, and had been senior wrangler in 1786.

Bickersteth now entered actively upon the study of the Law, and took chambers in No. 3. Fig-Tree Court. His letters during this period are not uninteresting.

"Everybody says, you are certain of success in the end, only persevere; and though I don't well understand how this is to happen, I try to believe it as much as I can, *and I shall not fail to do everything in my power.*" (P. 251.)

This last resolve was the secret of his success.

Bickersteth was called to the Bar on the 22d of November, 1811; and for some time he had no professional connexion whatever; "and the opinion," says Mr. Hardy, "that he was known to entertain of the necessity of simplifying the practice of the Law, and doing away many of its abuses, was not calculated to procure friends among those whose livelihood was in some measure derived from its imperfections and entanglements." (Vol. i. p. 276.)

A little employment came at last from Mr. Bryan Holme, who was the first solicitor who discovered his merits; and after this small beginning, his business pretty regularly, though slowly, advanced.

"My whole time," he says, writing to his parents in Dec. 1811, "will be passed either in Chambers or in Courts; and if being always in the way and always attentive to my business will give success, I shall be successful as soon as favourable circumstances concur to give me employment. In the meantime, I cannot express to you how uneasy I always am at the thoughts of having been, and continuing to be, so heavy a burden to you."

And then he goes into detail, and shows that he is laying out as little money as possible.

In another letter, shortly afterwards, he reminds his

¹ Mr. Hardy says, that Mr. Bell resigned his practice at the Bar with a view of not standing in the way of his juniors! This is certainly *un peu fort*.

parents that Sir S. Romilly, "who is now supposed to make 15,000*l.* a year, was for many years little thought of, and was in great difficulties" (vol. i. p. 283.); and all this time there is no evidence that his friends grudged him the necessary supplies.

But the whole of these letters show a very nice sense of honour in all money matters, and an almost morbid scrupulosity as to accepting favours¹ even from relations, still more from others. Mr. Hardy prints a letter from Sir F. Burdett honourable to both parties, begging Bickersteth to allow the former "to become your banker to a certain extent, say 500*l.*, the whole of which, or any part you might draw for whenever occasion made it desirable, and replace it at your own convenience." (Vol. i. p. 286.)

Prospects, however, began a little to brighten: —

"It would be untrue," he says, in Oct. 1814, "to say either that my success has hitherto been bad, or that it is likely my profession will enable me to maintain myself immediately. I have sufficient encouragement to persevere, and yet I have great reason to be uneasy."

In May 17. 1815, he says: —

"I am well in health, and my business perhaps advances, and certainly does not go back. It does not occupy my time, but I continue to live in the old way, almost entirely alone, which has become so much an agreeable habit that I could be almost content to be shut up among my books for ever without paying any regard to the buzz of the world around me."

On the 15th of January, 1814, Mr. Bickersteth was elected into a senior fellowship of his college; and here he showed a truly honourable and conscientious feeling, as to which we shall give an extract from his diary: —

"I always understood that the four Senior Fellows had some peculiar benefit from the *perse* foundation; and as I approached

¹ Acting in this spirit, he would not ask any body for any thing, and left Mr. Sanders, his secretary, almost entirely unprovided for. We do not think this sort of scrupulosity was justifiable, although it is quite consistent with the other points of Lord Langdale's character.

Seniority, hints were frequently given to me of the advantages I should have when I became one of the four Seniors. All this seemed a mere matter of course, and I thought nothing of the intimated advantages, but that if I remained in College I should at length receive some increase of stipend to the amount of sixty pounds a-year, without thinking that there was or could be any doubt of my right. I rarely attended College Meetings; and when I did so, ran down to Cambridge, and concurred in what passed upon the information I then received, and in the reliance that what they proposed was for the general benefit. In 1825, at a Meeting of the Master and Seniors, it was proposed to increase their stipends. I asked if it was clear that we were entitled to do so. I was told it was; and without looking at any document, I concurred in the vote of increase." (Vol. i. p. 288.)

But when he became a Senior Fellow, and had for some time as such received the increased amount, he did look into the documents; and finding that he had no right to it, he not only adjusted a new scale of allowance, but returned all that he had received. The sequel of the story is, that the Court of Chancery compelled the other Fellows to do the like; and the Judge who made the decree was the identical Fellow who had thus nobly acted. He at first declined to hear the cause, but at length consented to do so at the request of both parties.

It was at this period of Bickersteth's life that he began seriously to devote himself to the consideration of the Reform of the Law. To use the words of Mr. Hardy, he became "the pupil, friend, and follower of Jeremy Bentham; and after a twenty years' knowledge of his principles and exertions, Bentham declared 'that Bickersteth was, of all his friends, the most cordial to Law Reform to its utmost extent'" (vol. i. p. 320.); and at p. 330., a letter from the veritable Jeremy to Bickersteth is printed, beginning "Right well beloved, and my singular good disciple," inviting him to try his hand upon a *History of Whiggism*. Under these circumstances, he took a part from this time in most of the proceedings on Law Reform, and became a kind of oracle on the subject.

Mr. Hardy thus notices the position of that question about this time:—

"At the period when Mr. Bickersteth was called to the Bar,

Lord Eldon presided over the Court of Chancery, and his indecision, his doubts, and his overcautiousness, added to the various duties he had to perform in the Cabinet, in Lincoln's Inn Hall, and on the woolsack, produced a chaos of confusion and an overwhelming arrear of business in the House of Lords and in the Court of Chancery. Hundreds of causes were remaining to be heard—thousands of Suitors had abandoned proceedings, and many were ruined under grievous oppression, merely because they were unable to afford the money or the time necessary to enable them to proceed." (Vol. i. p. 349.)

Here then, certainly, Law Reform was needed, and motions on the subject of the Court of Chancery were frequent in Parliament. These ended in the appointment of a Committee of the House of Commons to inquire into the causes of the delay, and the appointment of a Vice-Chancellor; and ultimately in the issuing of the Chancery Commission. Before this Commission Mr. Bickersteth was examined. Of this evidence he says himself:—

"My evidence was given under the full persuasion that it would be offensive to the Judges and to the Attorneys, and to me in every way prejudicial. I certainly exaggerated nothing; but at the first I heard of nothing but my wild and visionary schemes.

"After a lapse of some time the case was very different. There were persons who thought that the evidence displayed an extensive and familiar knowledge of the subject of inquiry and of the practice of the Courts. After its publication I received many marks of attention and respect from strangers who had read it; and when reform of the Court of Chancery was talked of, I found I had become a sort of authority, and inquiries what I thought on the subject were very frequent." (Vol. i. p. 357.)

The evidence was also highly commended by Bentham, who showed it to Mr. Mill and Mr. Coulson.

On the presentation of the Report and evidence, the Government was obliged to take some steps; and Sir John Copley, then Attorney-General, was instructed to prepare a Bill to reform the Court of Chancery; and he immediately applied to Mr. Bickersteth, who expressed his willingness to assist him. This was in the spring of 1826; and in the autumn of that year Sir John Copley was made Master of the

Rolls, in the room of Lord Gifford, and soon afterwards Lord Chancellor.

Bickersteth, with some reluctance, applied to him for a silk gown, and received next day a favourable reply from Lord Lyndhurst; and in May, 1827, Mr. Bickersteth was made King's Counsel. After some interval, he confined his practice to the Rolls' Court.

He still continued, however, his devotion to Law Reform, and earnestly supported the establishment of the "*Jurist*," a quarterly publication, which commenced in 1827. This was the first publication which represented the science of Jurisprudence. "The idea," says Mr. Hardy, "of producing a work which should investigate and explain the true principle of legislation and the philosophy of the Law, arose with Mr. Bickersteth and Mr. Joseph Parkes." The latter undertook to draw up the prospectus for the work, and afterwards to be the editor of it until some competent person could be found whose time was not so much occupied as his own; and Mr. Bickersteth, whose engagements prevented him from assisting Mr. Parkes with his pen, contributed 500*l.* to set it going. This was certainly a handsome and effective contribution to the cause, and altogether the most striking proof that Lord Langdale ever gave of his sincerity in this behalf. The first number of the "*Jurist*" appeared in March, 1827, and Mr. Roscoe was appointed its editor. He continued to act as such until his engagements and failing health prevented him from attending to the work, and it was deemed advisable to discontinue the publication, and start a new one on an extended scale. Mr. Edwin Chadwick, whose writings on Penal Laws and on a Preventive Police had lately attracted much attention, was applied to by Mr. Bickersteth to conduct the proposed new series; and arrangements were made to enable him to do so chiefly at Mr. Bickersteth's expense. This new series was to have been started with the support of the late Mr. James Mill, Mr. John Stuart Mill, the late Mr. Sutton Sharpe, and Mr. Bickersteth, as contributors and active supporters. The work, however, was not proceeded with on account of Mr. Chadwick's engagements on the Poor Law Commission.

Mr. Chadwick says, in a letter to Mr. Hardy, "Whilst Mr. Bickersteth had great zeal for the Reform of the Law, he had a deep impression of the labour which it required to reform it successfully; to do which it must be advanced as a science. In this view for its advancement as a science, it required undivided attention, and an amount of concentrated labour inconsistent with its practice as an advocate, or even with its administration as a judge."

In the long vacation of 1827, Mr. Bickersteth was consulted by Lord Lyndhurst as to the new orders which had been prepared by Sir John Leach¹, Master of the Rolls. These were issued in April, 1828; and it may properly be said, that although the reform was small, yet the first steps were then taken in that mighty reform of this Court which will ultimately swallow up the Courts of Common Law:—

"Lord Lyndhurst watched the effect of these orders, and he did not seem disappointed in the discontent which was excited by them; his mind had been, in some degree, prepared for the result; and as his knowledge and experience of the Court over which he presided advanced, and as he became better acquainted with the vast complication of the subject, and the enormous extent of the private and corrupt interest adverse to all improvement, he saw there was more difficulty in effecting a reform than he had anticipated. He was forcibly struck by the enormous grievance which the suitors were suffering from delay, after their causes were ready to be heard. He saw, with deep regret, its dreadful extent; and although it was but one among many subjects of complaint, it admitted of a separate remedy, which might be adopted without disturbing any private interest, corrupt or otherwise; and the remedy he proposed consisted of two parts: the appointment of an additional Judge, and the increased efficiency of the Master of the Rolls. He brought in a Bill for that purpose in the Session of 1830; and the Speech he delivered in the House of Lords, when his proposal was made, *forms an epoch in the history of the great Chancery question. For the first time the real state of the case was not attempted to be concealed; the Chancellor made a distinct*

¹ In his notice of Sir John Leach, Mr. Hardy is unjust to the memory of that able Judge, and inaccurate in his statements respecting him; but as Mr. Hardy does not belong to the Profession, and does not appear to have sought information in proper quarters, his statements are unimportant.

and manly avowal of so much of the evil as the Bill was intended to remedy." (Vol. i. p. 375.)

This particular Bill was withdrawn chiefly owing to the unwillingness of Sir John Leach, then Master of the Rolls, to be bound by its requirements.

At this time it was that Bentham and other Law Reformers seem to have thought of forming a Law Reform Association. In December, 1829, writing to Bickersteth, Bentham says, referring to the late Mr. Tyrrell, one of the most useful conveyancing law reformers¹ who ever lived:—"Tyrrell, who enters into it most cordially, will be able, if you happen to come across him, to tell you more or less about it;" and adds in a P.S., "Burdett has 'promised' to take a part in it. It is the forming of a Law Reform Association."

This wish was afterwards happily realised; but Bentham and Tyrrell were dead; and Bickersteth, so far from giving any aid, did what he could to oppose it. He was ready, however—and for this he is to be praised—to help any government or any public man willing to promote Law Reform. Copley or John Williams, Michael Angelo Taylor or Lord Lyndhurst, had always his full assistance. To the last he only does justice when he says, in his Diary (1850)—

"With respect to reforms of the Court of Chancery, he seemed desirous of knowing what I thought, and of doing what, on consideration, appeared to him best and practicable. I spoke to him without disguise or reserve; he heard me without impatience and without taking offence, and I incline to think that nothing but over-caution prevented him from doing much more in the way of Reform. I have always felt grateful for the personal kindness which he showed me, and I am impressed with the idea that he sincerely meant well for the public."

This is well and truly said; and, we may add, as years roll on and past events are brought to light, no one comes

¹ By the way, it is strange that Mr. Hardy, in his notices of law reformers, never mentions Mr. Humphreys, the eminent conveyancer, and author of "Outlines of a Code."

out better, or perhaps so well, in the character of a practical and useful law reformer, as Lord Lyndhurst.

In November, 1830, he ceased to be Chancellor, and was succeeded by Lord Brougham. It was hoped and expected by Bentham and some others that Bickersteth would have been the Solicitor-General to the first Reform Ministry; and Mr. Hardy writes, as if well informed of all that passed in the Cabinet on that occasion: — “There is no doubt,” he says, “of his having been named to that office by Lord Grey” (p. 387.); but as he does not mention his authority for this assertion, we are not disposed to give it implicit credit, more especially as, in the next page, we find this statement: —

“Much as Lord Brougham had talked of and recommended Law Reform, he did not, when he had the opportunity, take any active steps to forward it, unless, indeed, the Act for the establishment of a Court in Bankruptcy can be called his, and adjudged as a beneficent act to the community.” (Vol. i. p. 389.)

Now it is well known that the two great points of the Bentham school were — Local Judicature (cheap justice), and Codification. Lord Brougham was made Chancellor on the 22d of November, 1830, and it appears from Hansard that ten days after (2d of December, 1830,) he brought in a Bill for the establishment of Local Courts. This he continued, from time to time, to press as opportunity served, until the spring of 1833, when it was rejected, on the motion of Lord Lyndhurst, at the third reading in the House of Lords, by a majority of two. We need not say that the greater part of that very Bill has since passed into law, and is to be found in the Acts of 1846, 1850, and 1852; and that the friends of Local Courts are so prejudiced and ill-advised as to look upon Lord Brougham as the author of those Acts, and to entrust to him the Bills for completing and extending the whole measure of cheap and local justice.

Then as to Codification, Lord Brougham, when Chancellor, issued the Commission for Codifying the Criminal Law. The commissioners began their labours in 1831–32, and in the various reports have completed the codification of that

branch of the Law ;— now, we trust, at length, and chiefly by the efforts of Lord Brougham, about to become law.

Indeed, we have only to refer to Lord Langdale's own authority, as given in Mr. Hardy's book, to confute this idle assertion. In vol. ii. pp. 40—47., he prints Lord L.'s last speech, which happened to be made on a Bill of Lord Brougham's for the extension of the County Courts, although Mr. Hardy omits all notice that "the noble and learned friend" alluded to was the latter noble lord. In this speech, among other things, Lord Langdale says, in support of this measure, "I cannot expect that my noble and learned friend (Lord B.) should bear in mind the suggestions which were made to him more than twenty years ago on this subject. *His Bill of 1832*, I believe, contained the first distinct proposition for the establishment of what may, perhaps, without impropriety, be called Local Masters."

We need not remind our readers that in 1832 Lord Brougham was Lord Chancellor, and that the Bill to which he alludes was the Local Courts Bill, brought in by him.

These are some of the proofs that, when Chancellor, Lord Brougham took no active steps to forward Law Reform! But perhaps the crowning proofs of this are, the reforms that were made in the year 1834, when the Statute Book shows that in every branch of the Law the most important reforms were made ;— in the Law of Real Property, in the procedure of the Common Law Courts, in the Court of Chancery, in the Criminal Courts, in the Privy Council. In this year Lord Brougham was Chancellor, but, of course, had nothing to do with any of them! So much, then, for this assertion, that, when in power, Lord Brougham abandoned Law Reform.

Passing these statements and some others as not only untrue, but as betraying, at best, ignorance the most profound, we proceed to mention the other incidents in Mr. Bickersteth's life.

In February, 1834, he was offered a Barony in the Exchequer, which he refused, when Mr. John Williams was appointed. In September, 1834, Sir John Leach, M.R.,

died at Edinburgh, and the following interesting correspondence forthwith took place.

Mr. Le Marchant, at the request of Lord Brougham, then Chancellor, applied to Mr. Bickersteth, stating that the office of Solicitor-General would, in all probability, be vacant by the promotion of Sir C. Pepys to the Rolls, and offering him the place of Solicitor-General. Mr. Hardy has stated that Lord Brougham had before prevented this very place being offered to Mr. Bickersteth. How it was that he now offered it to him Mr. Hardy does not explain; but of this latter fact there is no doubt.

"Mr. Bickersteth, however," says our author, "immediately determined not to accept the place, for he had no wish to hold any office, and least of all a political one." (P. 398.)

So that it would seem that if he had been offered the Solicitorship in 1830, he would have declined it, as the very same reasons for his refusal applied as well at one time as the other. These were, that, "considering the confidential nature of the office of Solicitor-General, and his political as well as legal duties, it does not appear to me that it can properly be accepted by any one between whom and the Administration no political relation subsists, or without a direct communication from the First Minister, and a clear understanding with him as to the political and the legal measures of leading importance, the promotion or support of which would be required."

Now there was just as much — probably more — political relation between Lord Melbourne and Mr. Bickersteth as between Earl Grey and Mr. Bickersteth; so that as he declined in 1834, he would probably have declined in 1830, and it was not Lord Brougham who stood between him and that office, as Mr. Hardy alleges, but his own idea of its responsibilities, and, we must add, his own peculiar temperament and nervous timidity, amounting to political cowardice. On one point we quite agree with Mr. Bickersteth, that the communication should have been made directly from the First Minister. But this was afterwards fully explained by that very Minister, who did make him a direct communication,

and mentioned to him the reasons for the communication by Mr. Le Marchant.

Mr. Bickersteth's account of this interview, from his Diary, is interesting: —

“ On Oct. 2nd I waited on Lord Melbourne at the appointed time. The first thing I said to him was, that I had come only to show my respect for him, and wished it to be understood at once that I had declined the office of Solicitor-General, but without any feeling of disrespect to him or any dislike to the general policy of his administration; that, on the contrary, I thought that *he* ought to be supported, and that if I knew a way in which I could properly render him service I should be glad. He expressed his regret at my determination, and rather in manner than in words showed a wish to know my reasons. I said that I really hardly thought myself qualified for the office, *and that I had a dislike to it, and probably could not have been induced to accept it under any circumstances*, but that certainly the offer had not been made to me by the proper person. The appointment belonged to the First Lord of the Treasury and not to the Chancellor, and I considered it important to the interest of the Public as well as of the Profession that the appointment should not be made by the Chancellor; and that I, for one, would not have received it from him.

“ Lord Melbourne here intimated his understanding that Le Marchant had written to me not to make an offer, but only to sound me, and that I might be assured that any proceedings as to my appointment had his entire concurrence.

“ I replied, that I anticipated that such would be the colour given to Le Marchant's letter, but that I could not construe it in that way; and as to any concurrence, it was, under the circumstances, out of the question¹, because the Chancellor's letter to Le Marchant must have been written at Edinburgh on the day after Leach's death.

“ Lord Melbourne then intimated that now at least the appointment might be said to come from him, and thus my objection be removed.

“ To this I answered, that *setting aside all the other reasons, I had so little inclination for the office, that I should have some difficulty to prevail on myself to accept it under any circumstances.*”

¹ Was it not probable that such an appointment had been the subject of previous conversation between Lord Melbourne and his Lord Chancellor?

The alleged reason, therefore, given by Mr. Bickersteth, was a mere pretext or, perhaps, an excuse to his own mind for not taking this office. The real reason was obviously an unwillingness to incur serious responsibility, even for the purpose of promoting his darling projects.

On this occasion Lord Campbell, then Attorney-General, wrote Mr. B. a letter, warmly urging him to accept the office of Solicitor-General : —

“I cannot help expressing my anxious hope that the office may be accepted. It would be most delightful to me to have such a colleague, and I confess I am not aware of any good reason why your country should now be deprived of your service.”

In reply, Mr. Bickersteth said : —

“It would have been a great satisfaction to me to assist you in promoting legal and political reform, and *I should not have feared any want of cordial and confidential co-operation.*”

Mr. Hardy adds the following : —

“Mr. Bickersteth received many other letters from his friends and well-wishers urging him to take the office which had been offered him ; but he persisted in his refusal as he felt that he differed essentially in his notion both of political, and legal reform from the principal Judge in the realm, and with whom he would constantly be brought in close and confidential connexion.” (Vol. i. p. 404.)

In what way he differed Mr. Hardy does not attempt to explain, nor can we imagine ; and this assertion is directly contradicted by his own letter to the Attorney-General. But thus it was that Mr. Bickersteth reconciled it to himself to decline the opportunity of serving the cause which he most loved. This, we submit, was a grave fault in his character, and we proceed to a still less doubtful passage in his life, showing this infirmity of mind in a still more remarkable point of view.

In December, 1834, Mr. Bickersteth was invited to become a member for the borough of Marylebone, but he declined this honour as he had previously declined a similar offer when he was a younger man. He says that reasons which he does

not state induce him to decline it. What those reasons were we cannot divine, but his refusal of this seat, which would have given him the effectual means of advancing his views as to Law Reform, and in a manner totally independent of any minister or any government, we must consider as showing still more clearly the great defect in his character. We may dwell on it a little.

In 1819 he was offered a seat through the Hon. Douglas Kinnaird, and to be brought in without expense; but to the great surprise of his friends he declined. In his Diary he thus explains his refusal:—

“If I were rich I should be glad to accept it, and being somewhat of an enthusiast though far less vehement than in former times, it is probable that being once engaged in politics I should be in earnest in the pursuit; but my poverty will not permit me to devote my whole time to politics, and I cannot consent to be a mere political adventurer, or to form a plan of making my parliamentary duties a secondary consideration or subservient to my profession. I am therefore determined to remain as I am.” (Vol. i. p. 333.)

Mr. Bickersteth had been then about eight years at the Bar, and was a rising barrister; but although a bold man might then have accepted this offer so made, yet, on the whole, we approve of his conduct on this occasion, and admit the validity of his excuse. In 1834 he had no such good reason. He was a prosperous and successful advocate, he had no family, he had a sufficient station and fortune, a few months afterwards, to ally himself to a lady of rank and title; all his friends urged him to consent,—friends whom he listened to when they advised his acceptance of a peerage; his success in his election was certain; but he still persisted in his refusal.

“Messrs. Grote, Warburton, Sutton Sharpe, and Joseph Parkes called on Mr. Bickersteth to urge him to consent to be put in nomination for the borough of Marylebone, and it was not without some trouble that he got them to accept a refusal.” (Vol. i. p. 406.)

He not only refused, but he lectured the worthy electors on their idea of taking pledges from candidates. This was

his peculiar *forte*, and what he most liked, — to shrink from responsibility, and to lecture others on their duty. He saw himself that this was egotistical, and merely sent the letter to Mr. Hovenden, who acted for the electors.

“On the 24th,” he says, “I met Hovenden in Court, and as he expressed a desire to see what I had written about pledges, I afterwards sent him my letter, with a request that he would return it, which he accordingly did.” (Vol. i. p. 412.)

But these were not the only occasions on which Mr. B. shrank from what we cannot but think his duty in Parliament. It appears that he was also proposed to stand for Finsbury, when he said he would “as soon go on a scaffold as to the hustings in a populous district, and endure its coarseness.” (Vol. ii. p. 102.) But what, perhaps, is the crowning defalcation in this particular is his refusal to stand for Westminster, in a former year when his success was certain, and when all his friends urged him to stand. This refusal Mr. Hardy has discreetly omitted, or perhaps has not inquired into the circumstances connected with it. If he wishes to learn them we can refer him to the survivor of those whom he mentions as Lord Langdale’s intimate friends and advisers.

In the new Parliament, in which Mr. Bickersteth might have taken so useful a part, Sir Robert Peel’s Government was defeated on the motion relating to the Irish Church, and on the 24th of April, 1835, “the veteran and talented Lord Lyndhurst,” to use Mr. Hardy’s expression, resigned the Great Seal, and Sir C. Pepys, Sir L. Shadwell, and Sir J. B. Bosanquet were appointed Lords Commissioners.

We now come to a portion of Mr. Hardy’s work which we cannot understand.

Alluding to the formation of Lord Melbourne’s Cabinet in 1835, and the non-appointment of a Lord Chancellor in that Cabinet, Mr. Hardy says : —

“The noble Lord who had been appointed to that office by Earl Grey could not be reinstated. The feeling of his former colleagues towards him made it impossible to consult with him in the Cabinet.” (P. 413.)

But in the very next page the putting the Great Seal in Commission is said to have "excited the surprise and indignation of the Profession and the Public." (P. 414.) And then, p. 415., Mr. Hardy observes, — "The whole affair seemed inconceivable, unless it was done for the object of keeping the place open for Lord Brougham, in the hope that the letter which he was known to have written to the King would, in time, have the desired effect of removing His Majesty's personal objection."

The whole affair, as Mr. Hardy states, is, indeed, "inconceivable;" for, first we have colleagues who cannot consult with their former Chancellor, and yet so construct their Cabinet as to contrive his return, which construction they hope will have the "*desired* effect."

Mr. Hardy had better have let such matters alone, or have given some useful information. As it is, he makes statements which the next page contradicts, and sometimes the very same page, as at p. 415., where he says the King had "a personal objection" to Lord Brougham; and in a note states a current report that Lord Melbourne, having sounded the King "as to the policy of delivering the seals to Lord Brougham," expecting that His Majesty would at once interpose his veto, and thus take upon himself the responsibility of having refused, the King replied, "My Lord, it is for you, the head of the Government, to name whom you please, and submit your choice to me, for my confirmation."

Now, on these statements, we protest that we cannot understand what it is Mr. Hardy wishes us to believe. Whether Lord Brougham's colleagues refused to consult with him in the Cabinet, or whether they desired his return and constructed the Government with that view.

Whether the King had a personal objection to his late Chancellor, or whether he wished him to resume the Great Seal.

All these statements cannot be correct, yet Mr. Hardy makes them all in the space of three pages, leaving us only certain of this, that his assertions on such matters are entirely unworthy of regard.

But in this unhappy page 415. there is yet another asser-

tion, which Mr. Hardy also contrives to contradict in the same page: —

“It was known to many persons,” he says, “that Lord Melbourne had said, on going out of office in November, 1834, that if he should ever return to power again he should certainly make Mr. Bickersteth Lord Chancellor; and when he did come into office he wished to nominate him to the post, but there was a difficulty in passing over the Master of the Rolls and the Attorney-General, and that was the reason why the Seals remained so long in commission.”

Now, if Lord Melbourne had made any such declaration or had any such wish, why did he not offer Mr. Bickersteth the Great Seal at this period? The reasons given are vain. He was reforming his Cabinet. The Master of the Rolls could have no such claim on a new government nor even the Attorney-General of a former government. If Lord Melbourne had any such idea we should have had a proposition from that very direct and straightforward statesman to Mr. Bickersteth, but as it is, we must pronounce this declaration of his Lordship, “known to many persons,” as a mere idle piece of gossip resting on no foundation better than Mr. Hardy’s statement.

The putting the Great Seal in Commission was doubtless open to great objection, and on the 25th of December, 1835, Lord Melbourne made a communication to Mr. Bickersteth, not offering him the Great Seal, as Mr. Hardy again states, p. 445., that “he greatly desired, as I have already stated,” but of the following nature —

“The Cabinet have decided upon taking His Majesty’s pleasure upon the appointment of a Lord Chancellor, and having found upon communication with the Master of the Rolls that he is deeply impressed with the conviction that the time is come when it is absolutely necessary to consider both the equity and the appellate jurisdiction, with a view to their speedy and effectual amendment; and that he is prepared to grapple with the difficulties of the question, I have offered to submit his name to His Majesty for the custody of the Great Seal. I have not yet received his final answer, but I entertain very little doubt that it will be in the affirmative; and in that case I should be very desirous of naming you to His Majesty for his successor at the Rolls.”

This then was Lord Melbourne's wish, and we must say, that if he had any other idea, as he had in the previous May and June been in communication with Mr. Bickersteth, with respect to his views as to the Court of Chancery, nothing would have been easier than to have ascertained how far it accorded with those of Mr. Bickersteth.

As it was, he was offered the Mastership of the Rolls, and it is important to see on what grounds and for what reason. These are thus stated by Lord Melbourne: —

“ Suffice it to say that my principal motive arises from the knowledge which I have of your deep sense of the primary importance to the community of the due administration of justice; from my conviction of your anxiety to remove errors and supply defects; and *from my certain assurance that for these purposes you will lend to the Lord Chancellor and to his Majesty's Government your cordial and active assistance and co-operation.*

“ Considering the general state of parties, and considering the great pending legal questions, it is evident that we shall require your aid and support in Parliament, but whether in the House of Lords or Commons may be left for further consideration. I only wish to be informed *whether you would be unwilling to accept a peerage if it should be thought expedient for the present arrangement or on general grounds that you should do so.*”

To this very great and handsome offer Mr. Bickersteth immediately raises a doubt: “the judicial office might immediately have been accepted, but the idea of giving assistance in Parliament made me seriously hesitate.” Hesitation! The idea of gaining place and power by means of which Law Reform might cease to be a dream and a speculation, but grow into a reality, causes the Law Reformer to tremble. A willing Government, a co-operative Lord Chancellor, an assistant Parliament, an impatient public, all these concur; and yet the man who had devoted his best hours to the framing the work to be done, hesitates to put his hand to it or even to approach it.

The letter is received on the 26th. On the 27th, Mr. Bickersteth begs for time for reflection. On the 2nd of January,

Lord Melbourne and Mr. Bickersteth meet in South Street, at Lord Melbourne's house, to talk over what the former had justly called "an offer, which to a man who had subdued within himself the more violent struggles of ambition, was perhaps the most advantageous that could be made." (Vol. i. p. 450.)

We now quote Lord Langdale's diary : —

"At the close, Lord M. said, your view is to consent to take the judicial office by itself, but not connected with a seat in either House.' I said, 'exactly so.' Lord M. replied, 'I must take a little time to consider of it, and will let you know.'

"On Wednesday, 6th I saw Sutton Sharpe, to whom I communicated what had passed. *He thought me entirely wrong in refusing a peerage*, insisted that as Master of the Rolls with a peerage, I should be able to contribute greatly to Legal Reform, &c.

"*After a very long conversation he left me in doubt* whether I had done right, and I determined to see Mill on the subject. I talked with him in a day or two afterwards, and found, somewhat to my surprise, *that he agreed with Sharpe*, and considered that I ought to have accepted a peerage." (Vol. i. p. 452.)

Who, indeed, but Lord Langdale himself could have doubted it.

On the 10th of January Lord Melbourne renewed the offer and begged Mr. Bickersteth to acquaint him "whether upon reflection you continue indisposed to undertake the House of Lords." (Vol. i. p. 452.)

Then ensued a second interview, and in a second letter Lord Melbourne thus shaped his proposal, "If you are ready to undertake the Rolls, we are ready to give it upon the understanding you so clearly expressed this morning. *We can hardly dispense with your assistance in the House of Lords*, but you must not consider yourself bound to give support *politically*."

This arrangement was accepted; Sir C. Pepys became Lord Chancellor, and Mr. Bickersteth Master of the Rolls and Lord Langdale; and the latter took his seat in the House of Lords on the 4th of February, 1836, having been previously (19th January) appointed Master of the Rolls; pledged, however, most distinctly to assist the Lord Chancellor and

the Government in devising measures to improve the administration of justice, to remove errors, and to supply defects.

How this pledge was fulfilled we are now to see.

Lord Langdale was here placed in a situation where, for the reasons we have mentioned, he could be of infinite service to the cause of Law Reform. He might have been in effect if not in name a Minister of Justice. This was the opinion of the gentlemen he consulted, Mr. Sutton Sharpe and Mr. Mill, upon whose advice he accepted office. He had been already reminded of his duty.

"As early as Jan. 1836, he was requested by Lord Melbourne to see to the preparation of several Bills that Lord Brougham had undertaken to introduce, but which the state of his health prevented." (Vol. ii. p. 2.)

We wish Mr. Hardy had printed this letter, which we presume he could have done. As it is, he says, Lord Langdale cheerfully complied, as is seen by the following letter.

Jan. 30. 1836.

"My dear Lord, — I will take the earliest opportunity of conferring with the Attorney-General on the several Bills which you mention; *and on every occasion in which Legal Reform is in question your lordship may be assured that I will give the best attention in my power to the subject.*"

Of these Bills, the only one which he considered "in a fit state to be safely and properly recommended for adoption was that for regulating the Execution of Wills." The remarks he makes on the Bill for abolishing Imprisonment for Debt, and the Local Courts Bill are unfavourable, although it is to be observed that they have passed nearly in the form in which they then stood.

His first speech was in *opposition* to the measures for the reform of the Court of Chancery, which were prepared by Lord Melbourne's Government.

"On this occasion," says Mr. Hardy, "it was said that he deserted his party the first opportunity he had; but that is an unfair accusation, for he could not desert what he had never joined." (Vol. ii. p. 5.)

But it will be remembered, that in the Letter of Lord Melbourne, which we have printed *antè*, p. 28., the understand-

ing was, that Lord Langdale was to give his cordial support to the Law Reform measures of the *Lord Chancellor* and the Government. The opposition which he gave to the Reform proposed by the Lord Chancellor had the effect of defeating the measure, as it was not pressed by the Government. We do not say that Lord Langdale's views were unsound: they will be found stated in another part of this Number: we only say, that it appears to us that his conduct on this occasion was not quite consistent with the footing on which he obtained his seat in the House of Lords; and this was thought to be the case at the time, as Mr. Hardy admits; and he adds, "If Lord Cottenham was displeased with the speech made by the Master of the Rolls when the Bill was read the first time, he was doubly mortified at his speech on the second reading." (Vol. ii. p. 5.) And he had said before, "Lord Langdale's speech gave great offence to the Chancellor." (Vol. ii. p. 4.) And Mr. Hardy seems to state this as a sort of triumph of Lord Langdale. But we do not think that the mortification and displeasure of the Lord Chancellor, and the great offence given to him, ought to have been, under the circumstances, quite agreeable to the Master of the Rolls.

"The next speech of any length that Lord Langdale delivered in the House of Peers was on moving the second reading of the Bill for the Amendment of the Law respecting Wills." (Vol. ii. p. 5.)

This, indeed, is the chief legislative effort of Lord Langdale. This is really the only Bill of importance that he ever introduced. He talked about others, he opposed others, he criticised others, he supported some very few others; but this (unless the Bill for appointing a third Vice-Chancellor is to be mentioned) is the only Act which he has left on the Statute-Book. The "Wills Act" is all that remains to us as the complete work of one who, we are now told, was the great Law Reformer of his age. But this Act, alas! which, we are informed, "he carefully considered with Mr. Tyrrell, and made such alterations as he deemed necessary" (vol. ii. p. 6.), has been, without doubt, the most questionable of the whole

series of Law Reform Acts. Whatever merit it has belongs to the Real Property Commissioners. The present Lord Chancellor, when Sir E. Sugden—which Mr. Hardy, with some want of candour, does not notice—attempted to have this Act suspended and repealed at the commencement of the Session 1837—(an attempt which was foiled only by the admirable speech of Lord Campbell, then Attorney-General,)—and in last Session a portion of it was, in fact, repealed by the “Wills Act” of that year. Indeed it must be allowed, that the measure is a very doubtful one, and certainly it has brought about more practical hardship and injustice than any other Statute, be it what it may. Indeed this is admitted by Mr. Hardy himself, who says, “it has not worked well.” (Vol. ii. p. 6.)

On the occasion of the Common Law Courts’ Bill, in June and July, 1837, Lord Langdale gave his views in the House of Lords, derived from Bentham, and which, we believe, had been previously stated in that House by Lord Brougham, that the expenses of the Judicial Establishment, and its officers, should be supported by the Government. He was right in this principle, which was acted on last Session to some extent, but he should have restricted it to the payment of such establishments for contentious and litigatory purposes, and not for ministerial purposes. This distinction is properly taken in the Report and Papers on this subject of the Committees of the Law Amendment Society.¹

On the 26th of February Lord Langdale said on the Borough Courts’ Bill,—

“I hope I may be excused for expressing my opinion, that for facilitating procedure and inquiries in the Court of Chancery there is a great need of local authorities both ministerial and judicial. The jurisdiction of the Court extends over the whole country, and many things are to be done personally by persons required to obey the orders of the Court. Great unnecessary expense is occasioned to the suitor. What reason can be given why officers should not be provided to enable suitors living at Carlisle and Liverpool, or in Cornwall, to swear their answers and examine their

¹ Printed, 7 L. R., pp. 361—373.

witnesses in their own neighbourhood, and have their answers and depositions officially conveyed to London? But I go further, and think that other duties having more of a judicial character might well be entrusted to such local authorities. My Lords, I am persuaded that such regulations might be framed and such a system of control established as would make it perfectly safe and satisfactory to the suitors, and a great saving of expense, to have many operations of the kind and many important inquiries conducted in the country."

This was all well, but he brought in no Bill to establish this principle; and here we are, thirteen years afterwards, without any such measure in operation, although it is true that such a Bill has been brought in, though proposed by that very Law Reformer who, according to Mr. Hardy, abandoned Law Reform when he obtained power. That power, we are thankful to say, still remains to him, and with it the will to effect these and other useful reforms which Lord Langdale was so fond of talking about, but not of trying to effect.

In May, 1840, the Court of Chancery again came before the House, when he no longer opposed a moderate Reform, which consisted in giving additional assistance to the Court. Among other things he said, according to Mr. Hardy (vol. ii. p. 22.), that, under proper arrangements, and by the addition of appropriate strength, the House ought to be enabled to dispose of all the appellate judicial business of the country, and that the appellate business of the Court of Chancery ought then to be transferred to the House of Lords.

But Mr. Hardy does not state that when Lord Campbell in 1842 brought in a Bill — Lord Campbell does not content himself with mere talk about Reform — to effect this change, Lord Langdale *opposed* it, and the Bill was consequently abandoned.

Mr. Hardy next adverts to Lord Langdale's speech on the second reading of the Attornies' and Solicitors' Bill, and says: —

"On one point, that of the examination of articled clerks prior to their admission on the roll of attornies, he spoke with considerable approbation: the orders establishing the examination in this

Court were made soon after his appointment to the Mastership of the Rolls, and he always took great interest in the conduct of the examination and its successful progress." (Vol. ii. p. 25.)

He approved, then, of an effective and compulsory examination of attornies previous to admission, but he took no step to secure the effectual and compulsory examination of barristers previous to their being called to the Bar, although, as one of the Benchers of the Inns of Court, he was charged with this especial duty. It seems that he was called to the Bench of the Inner Temple on the 22nd of June, 1827, was Reader in 1835, and Treasurer in 1836 (vol. i. p. 369. n.), and he died in 1851, so that for twenty-four years he received an allowance of from 100*l.* to 200*l.* out of revenues expressly granted for educational purposes, and not so applied. We do not know how the high-souled Fellow of Caius College, whose conduct we have already praised, justified in the pure Equity Judge this breach of trust, or soiled his hands by participating in it. Nor can we understand on what principle he adhered to the practice of the exclusion of Mr. Hayward and others from that Bench by secret voting, or how, when the Judges as visitors of the Inns of Court recommended the adoption of some other rule, Lord Langdale continued the practice of voting by ballot. These are points which it would have been well if Mr. Hardy, who has all the necessary papers, had explained, but he has not alluded to them. We may state, that we have heard, on good authority, that at the Inner Temple he was always indifferent about Legal Education, and was rather a stumblingblock to progress in this respect than an assistant. This we heard from two of that learned body, who themselves assisted as lecturers.

In April, 1843, Lord Langdale *opposed* the Bill brought in by Lord Campbell for shortening Conveyance, declining to go into Committee on the Bill, or to permit Lord Campbell even to put it in an amended form. He *opposed* this Bill, and brought in no better; he preferred to lecture the House on general principles, to declaim on the abuses of the Law, and object to all practical attempts to amend them. He had, indeed, two or three pet subjects for declamation of this kind, on which he delighted on all occasions to discourse,

which he never attempted to enforce as practical measures, and which, if any one else attempted to do, he then usually opposed. He seemed to like to keep them *unpassed*, that he might talk about them. They were, in fact, his *stock in trade* as a Law Reformer.

We next come to his share in the Act for abolishing the Six Clerks' Office, and granting those compensations which have been called the 10,000,000*l.* compensations:—

"The speech," says Mr. Hardy, "he delivered on the 22d of May, 1843, was one which might have been expected from him on account of his strong sense of rectitude, and his objection to the exaction of fees from the suitors of the Court." (Vol. ii. p. 29.)

He had frequently objected, and properly objected, to the payment of compensations to officers of the Court, but in this case he brought himself to consent to it, and was of opinion, on the whole, that "it was better to make the reform, and continue the charges on the suitors for the limited time during which the compensations may be payable, than to perpetuate the charge, together with all the inconvenience and evils which it has become so desirable to remedy."

This was a reasonable and practical view of the subject. The Government would not take the burden; the reform was necessary, it could only be accomplished in this manner. There were good reasons for a reasonable compensation, to be assessed in the usual way by the Treasury, but there were no excuses for the atrocious (we can use no other word¹) compensations which were most unjustly fixed by that Act. With respect to this Act, the charge of carelessness, amounting to unconscientiousness, lies heavy at the door of those who had a principal share in passing it. Lord Lyndhurst, as Chancellor, is not free from blame, but if one public man de-

¹ Mr. Hardy admits these to be enormous. "Talking about the enormous compensation on the abolition of the Six Clerks' Office, his Lordship said, that during his late sleepless nights he had turned over in his mind a plan for having the compensations valued, and purchasing Government annuities for them." (Vol. ii. p. 109.) Well might his nights be sleepless from such a cause, but if he had taken ordinary care at the time all real mischief would have been prevented.

serves more blame in this respect than another, we regret to say it is Lord Langdale, simply from trusting details to others which he should in his position have mastered himself.

While feeling it our duty to speak thus harshly, let us mention one speech of Lord Langdale's, about this period, in which we cordially agree. This was on the 6th of March, 1846, on the Parliamentary Proceedings Bill:—

“He said that the best if not the only means of guarding against hasty, rash, and indiscreet legislation, is to bestow adequate care on the preparation of Bills before they are introduced in either House. A business so important ought not to be left to the diligence and caution of individual members of Parliament, or even to the responsible government officers, or ministers charged with other duties sufficient to occupy their whole time. No business is so difficult or requires so much care, attention, and caution as the business of making new laws; and no new laws should be proposed *without the official report of a responsible minister*, stating accurately and authoritatively what is the present state of the law with reference to the subject; what are the inconveniences which are found to arise from it; upon what principles it is proposed to provide a remedy; and how these principles are intended to be applied. If this were carefully done, we might reasonably hope to have less of rash and inconsiderate suggestions from ignorant and incompetent persons; less difficulty in dealing with such suggestions when made; less time wasted in idle and unnecessary discussions; more of useful deliberation and less hurry; a greater facility of preserving uniformity of enactment and expression; in short, better laws. Further, if proper means were taken to ascertain and correct the errors which must be found in almost every application of new laws, we might hope that the whole system of new laws would be gradually, effectually, and safely improved. To do what ought to be done towards attaining this great and important object would require the constant and unremitting attention of Government. *By the exclusive employment of a Minister charged with the particular duty of attending to the affairs of legislation* and justice, you might probably reduce to a small amount not only the inconveniences which this Bill is intended to diminish, but many other inconveniences of still greater importance.” (Vol. ii. pp. 35, 36.)

This is admirable alike in intention and expression, and

for his steady and repeated assertion of the principle of establishing a MINISTER OF JUSTICE, Lord Langdale deserves great praise. We could have wished that he had brought this proposition distinctly before the Legislature; and here let us remember, that at the last Annual Meeting of the Law Amendment Society, on the 23rd of June, 1852, even our Economical Reformer, Mr. Hume, expressed his hope that such a Minister would be appointed, and declared that he would do what he could to promote such an appointment.

In the last speech made by Lord Langdale, on the 7th of March, 1851, and very properly given entire by Mr. Hardy, we entirely concur, and consider it a valuable contribution to the cause of Law Reform. He then asserted the necessity of the State relieving the suitor from all expense connected with the judicial establishment of Courts, including the buildings necessary for Courts of Justice; the advantages of the local administration of justice, as well in matters of equitable as of legal jurisdiction (he had not foreseen that ultimately the fusion of these jurisdictions must take place); and insisted on the necessity of sufficient judicial power in these Courts:—

“‘Unless,’ he said, ‘there be ample judicial power for the transaction of the increased business which will be thrown upon them, there will be delays and confusion. Without a sufficient number of judges, arrears will accumulate; or, what would be still worse than arrears, hasty and unsatisfactory decisions, erroneous orders, and *even right orders appearing erroneous, because so hastily pronounced.* You must, therefore, have no scanty provision of judges.” (Vol. ii. p. 44.)

But he further insisted on the simplification of the law, and, as a means of obtaining this, on Codification:—

“As to the simplification of the law, I request your Lordships to observe that the more the jurisdiction of the Local Courts is extended, the greater is the obligation upon the Legislature to use all practical means to simplify the law. There are too many cases in which you cannot by any means prevent very complicated statements of facts, and very nice, difficult, and doubtful questions of law from arising. No rational person, I suppose, imagines that the law is in as clear and simple a state as it might be by skill and

industry. *What I wish to suggest is, that all which can be done ought to be done for the simplification of the law, and for the promotion of its expression in writing, to encourage and facilitate codification.*" (Vol. ii. p. 46.)

This is excellent, nor can we possibly omit the conclusion:—

"To trouble your Lordships no further on this occasion, I take the liberty of stating, that in my humble judgment all that is desirable to be done with reference to the improvement not only of the Local Courts and of all the other Courts, but of the Law itself, cannot be done without the appointment, under some appropriate name, of a MINISTER OF JUSTICE, whose duty while in office would be to attend principally if not exclusively to this most important of all subjects." (Vol. ii. p. 47.)

All this is highly valuable, and we have great pleasure in adding Lord Langdale's authority in furtherance of these reforms for which we have so long contended. Mr. Hardy thus fairly enough alludes to Lord Langdale's appearance in the House of Lords, in which he

"could hardly be said to shine. He was no debater, nor what is commonly called an eloquent speaker. There was no passion in his declamation, no animation in his gestures, and little emphasis in his tones; and yet there was no monotony. His manner was collected and dignified; but occasionally his eye ranged rapidly about him as though he would read in the faces of his listeners the effect he was producing. His arguments were calm, clear, and deliberate, and seemed to have been written and studied, rather than an effusion warm from his brain. He was always temperate and chaste in his expressions; ridicule and sarcasm were never employed by him, as he thought both *beneath the dignity of a judge* (?) He used neither ornament nor picturesque illustrations to assist his statement. He held his imagination under the severest control, and trusted to the simplicity and lucid arrangement of his facts to prove the effect he desired; nor did he ever allow party feeling or politics to influence his choice of words; but when he spoke of the delay in the administration of justice—subjects in which his whole soul seemed wrapped—then his cheek flushed, and he kindled into an earnestness of expression unusual for him to exhibit." (Vol. ii. p. 47.)

Lord Langdale, although not a very distinguished Judge, was highly painstaking, and in this capacity praiseworthy. When his business was at a standstill —

“he would write to the Lord Chancellor to report the fact, offering to fill up his vacant time by undertaking any other official duty the Chancellor might think fit to put upon him on the occasion.” (Vol. ii. p. 54.)

He was disposed to work as a Master: —

“The Master of the Rolls is himself chief of the Masters; and Lord Langdale considered there was no difficulty in his taking upon himself the functions of a Master if he had leisure so to do.” (Vol. ii. p. 55.)

Mr. Hardy, in a subsequent page (p. 100.), mentions, that the late Master of the Rolls always expressed his willingness to act as a Judge-Master, even before the Act of last Session was brought in.

More doubtful, we think, was his conduct when he refused to stop a cause when one of the leaders in his Court was called out of Court and informed of the death of his mother. The reason savoured to our minds of what is best known as priggishness, from which he certainly was not free: —

“‘That gentleman,’ he said, ‘is one of my most extreme friends, and I sympathize sincerely with him in his affliction; but as I could not stop the progress of public business if the junior concerned in the cause had met with a similar bereavement, I should hold it unjust to stop it because the misfortune occurred to a leader who is my intimate friend.’” (Vol. ii. p. 56.)

Lord Langdale disapproved of the closing of all the Courts in the Long Vacation: he thought it “would be better to have a relay of Judges and Counsel, so that the Court might be always sitting.” (Vol. ii. p. 61.) And on one occasion he exclaimed, with considerable indignation, “The Court is now about to close for a quarter of a year; it is a scandalous shame; the door of justice never should be closed.”

On the occasion of the *Attorney-General v. the Ironmongers Company*, the question was discussed as to how far that officer could hold a brief for any person but the relator;

and he remarks, that "the reports had not done justice to the Attorney-General (Sir John Campbell), who behaved so well, so gracefully we might say, on the occasion, and who argued the case with such ingenuity and great talent. There is," he said, "no doubt that Campbell, Pemberton, and Follett, are by far, very far, the first men at the Bar." (Vol. ii. p. 64.)

Altogether his judicial conduct and history are the most satisfactory part of the life of Lord Langdale. The following anecdote shows the remarkable cowardice of the legislator, and Mr. Hardy gives it as if creditable to his hero:—

"Speaking on another occasion of the proposed reforms in the offices of the Court of Chancery, he said, 'I am determined not to put myself forward as the attacking party; but I am willing to march side by side with the Chancellor: I will not take upon myself the odium of the assault, and leave the Chancellor the grace.'" (Vol. ii. p. 94.)

What great or useful reform in the law, we would ask,—nay, what noble or generous action,—was ever accomplished in this spirit?

Mr. Hardy devotes considerable space to the successful exertions of Lord Langdale to establish and complete a Record Office,—perhaps the most valuable labour of his life,—and in this we think he is entitled to the praise of which his biographer is so lavish. His Lordship was also a worthy trustee of the British Museum.

We now come to an important subject, as to which Lord Langdale is entitled to, if not to blame, to very small merit. We allude to the Registration Commission, over which he presided. This was issued in February, 1847, and Mr. Hardy says, —

"As in everything he undertook, Lord Langdale was indefatigable in his attention to the subject." (Vol. ii. p. 222.)

But the result of this Commission, as stated in the next page, negatives this eulogy:—

"His labours resulted in the presentation of a voluminous and learned Report to Her Majesty on the labours of the Commission

relating to Registration ; but he was prepared to enter upon the other branch of the subject referred to the Commission, when illness and death overtook him." (Vol. ii. p. 223.)

But how was it that in the four years that were spared to him he did not ever introduce a Registration Bill, and that at the close of the year 1852 we are still inquiring after this great reform? Mr. Hardy surely indulges in a sneer when he closes this chapter with the observation that "the surviving Commissioners are unhappy in having lost a colleague so admirably qualified to assist their labours, and to bring them to a satisfactory conclusion!" We may observe that the first thing the Commissioners should have done was to apply for an extension of the terms of their commission, as the Chancery Commissioners did, which would have been granted to them as of course. This was immediately pointed out at the time in these pages¹, and is admitted by the Commissioners in their Report.²

But we pass on to the crowning act of Lord Langdale's political cowardice.

In 1849 Lord Cottenham fell ill, and the business of the Great Seal got into arrear. It was rumoured that Lord Langdale had been offered the Great Seal, and had refused it, upon which Lord Lyndhurst wrote to him the following letter:—

"MY DEAR LANGDALE,—I am told that nothing will induce you to accept the Great Seal: I do not believe it. *You are not a man to prefer your ease and private interest to that of the public.* There is no person as Chancellor so well calculated to complete the reforms of the Court, every day becoming more necessary and urgent, as yourself. There is no object of more importance to the public welfare, or which, when accomplished, will redound more

¹ See 6 L. R. p. 163.

² Alluding to Judicial Registration, on which evidence was given before the Commissioners, the Report says:—"We have not thought ourselves warranted by the terms of the Commission in entering into the consideration of the very extensive changes in the law, by which such a system of registration must obviously be preceded." Why, then, was not an extension of these terms applied for, and the question set at rest?

to the credit and honour of him by whom this great good shall be effected. Consider this well, and weigh it in all its bearings.

"Your sincere friend,

"(Blind as a mole),

LYNDHURST."

To this noble invitation, from a political opponent, so well and so kindly expressed, Lord Langdale uttered (April, 1850,) "an uncertain sound."

"'I think,' he said, 'there is more reason than ever for vigorous and careful reforms in Chancery, especially as the desire for change grows predominant, and seems to become very rash; *it will ultimately prevail*, and if not carefully guided, will very likely, with the evils sweep away many of the most important advantages which the Court has hitherto secured to the country. *This subject will not bear neglect*, but I do not see how that which is required to be done can be done by any Chancellor, or by any one whose mind is stretched to its utmost power of useful exertion by the performance of his ordinary duties. I am, indeed, not less convinced than I was in 1836, that a change in the office of Chancellor is absolutely necessary, not only for the complete and satisfactory reform of the Court of Chancery, but generally for the reform of the law, and for the improvement of our mode and system of legislation; and after much reflection I have come to the conclusion, that it would require the greatest possible self-delusion to induce any man to accept the office of Chancellor upon the notion that he could in that character accomplish the work which is now required.'" (Vol. ii. p. 245.)

On this we would ask how, and in what character, could such a reform be accomplished? We should have thought that the holder of the Great Seal, with a willing Government to back him, and two preceding Chancellors to support him, and no opponents at all that we can make out, might have done any thing that was right in the matter; but if Lord Langdale preferred bringing the measure forward in the character of Master of the Rolls, separate from all political parties, and independent of them all, he was already in a position so to do. What we complain of is, that he would neither take the Great Seal and accomplish this great work, nor bring it forward as Master of the Rolls, which office was

given to him to enable him to accomplish large Law Reforms. He would do neither of these, but he was always willing to talk and write "about and about" these changes, whilst he usually opposed smaller reforms brought in by others, as by Lord Chancellor Cottenham and Lord Campbell, which would have led on to the very reforms which he professed to have at heart; thus being in fact an obstacle, rather than an assistant, to Law Reform, from the very day on which he first entered the House of Lords.

But in his letter to Lord Lyndhurst, he said, the Great Seal had never been offered to him, and that "he had not the least reason to think that it would ever be offered to him;" thus always making up an excuse not so much to others as to himself.

This difficulty was soon removed. On the day that Lord Cottenham resigned, he wrote to Lord Langdale requesting to see him.

"At this interview Lord Cottenham told him that he had sent in his resignation of the Great Seal, and that Lord John Russell had said that it was impossible to go on with temporary expedients, and that a Chancellor must be named: he then said, that he had been requested by Lord John to ascertain whether he (Lord Langdale) would take it if it were offered to him.

" 'I think not,' was the reply, '*but I could not positively say.*'"

A day or two after, Lord John Russell requested Lord Langdale to call on him.

"At this interview, Lord John Russell, having obtained the Queen's sanction, made Lord Langdale the offer of the office of Lord Chancellor; and Lord Langdale having respectfully declined it, he was requested to reconsider the matter." (Vol. ii. p. 249.)

Unfortunately for his reputation he has left a memorandum in his own handwriting, "the result of this reconsideration." This Mr. Hardy apparently considers so creditable to Lord Langdale that he has caused it to be engraved as a fac-simile of Lord Langdale's handwriting. It is as follows:—

CONTRA.

Persuasion that no one can perform all the duties that are annexed to the office of Chancellor.—Certainty that I cannot.

Unwilling to seem to undertake duties, some of which must (as I think) be necessarily neglected.

No reason to think that the extensive reform which I think necessary will meet with any support.

No particular party zeal, and no capacity to acquire any.

Declining health.

PRO.

Salary of 14,000*l.* instead of 7000*l.*

Pension of 5000*l.* assured (instead of 3750*l.* not assured).

Patronage for benefit of connexions much needing it.

Some, though small and doubtful, hope of effecting some further reform in Chancery.

This memorandum appears to us completely to establish the truth of the defects in Lord Langdale's character, which we have alleged. He was a selfish man, who thought almost entirely of his own ease, and was willing to risk nothing for the sake of his principles. Salary, pension, and patronage come first to his mind in the way of benefit; the power of advancing the cause to which he had owed nearly all his success, comes last in the scale. How he could persuade himself, under the circumstances we have mentioned, that "the hope of effecting some further reform in Chancery" was "small and doubtful," we cannot imagine, especially as some years before, Lord John Russell, then Prime Minister, had, as Mr. Hardy ignorantly or purposely omits to state, declared himself in favour of a division of the duties of the Great Seal. Never, it appears to us, was so fair an opportunity lost of accomplishing a great object safely and easily; certainly there was every reason for proposing it. After this Mr. Hardy has but small right to say of Lord Cottenham, "as a politician he was useless. He was not in his heart a true *law* reformer, and in more than one instance he was the cause of the miscarriage of important legal measures." (Vol. ii. p. 252.) And he also says, that "when he was promoted

to the Great Seal, Lord Melbourne required from him a statement of his proposed Chancery Reform, as it was upon the express condition of his bringing forward a great measure on the subject that he was advanced to the Chancellorship. Lord Melbourne had also obtained from Mr. Bickersteth and Sir R. M. Rolfe statements of their views of Chancery Reform."

Now Lord Langdale, as we have shown, entirely owed his elevation to this idea, that he too would bring forward a great measure of Chancery Reform. Lord Cottenham did so and was thwarted by this very Lord Langdale. The latter never brought forward any measure at all. We wish Mr. Hardy had printed, if he could, Lord Cranworth's views, for to him we now greatly look for a clear and comprehensive scheme on this subject.

The consequence of Lord Langdale's unfortunate view of the case was, that after putting the Great Seal in Commission for some time, it was given to Lord Truro, an active opponent of all Law Reform. We cannot imagine how this conduct, on the part of Lord Langdale, was consistent with a sincere and disinterested love of Law Reform, and willingness to make sacrifices in its favour. We cannot therefore quite agree with Mr. Hardy, when he says, — "In the case of Lord Langdale there is hardly sufficient shade in his character to throw over his virtues the relief that they deserve." (Vol. ii. p. 328.)

Up to the year 1848 his health was good; after that time he became unwell, and his illness increased in the years 1849 and 1850. He offered to resign early in 1851, but deferred it for a few months to suit the convenience of the Government, and in March in that year he finally retired, and on the 18th of April he expired.

We now leave the reader to judge for himself as to the correctness of our estimate of Lord Langdale's character and public life. We have made no statement for which we have not given our authority, and in pointing out the faults of this learned Judge, we have only performed what we consider to be a duty. We have given him all the praise to which in our opinion he is fairly entitled. We have not attempted to hide his faults.

We have already noticed one or two errors and omissions of Mr. Hardy. He tells us repeatedly that he is not a lawyer. He need not have done so, as this is sufficiently obvious, but a little care would have saved him from the inaccuracies which the want of information has produced, and perhaps it might have been suggested to him that none other than a professional man was competent to handle correctly the papers entrusted to him.

We had noted some other errors, but we do not think that any good service would be performed by pointing them out. This book can have no authority, and as coming from an unprofessional person, will probably mislead no one. We are assured that the family of Lord Langdale already regret its publication, and we now consign it to that share of future attention to which its merits entitle it.

It will be seen that the opinions in this Article as to Lord Langdale differ from those expressed by Lord Brougham in Art. VIII., to which we refer our readers.

ART. II.—ATTORNIES NOT CONVEYANCERS.

Attornies not Conveyancers. London. Printed for the Author, [R. GROOM, Esq.,] by Luke Hansard and Sons, 1820.

THE pamphlet at the head of this Article is of considerable interest at a time when the fetters which now bind the transfer of land are about to be burst. As a necessary part of this enfranchisement a class of practitioners will be demanded who, adjusting themselves to the new state of affairs, will facilitate all dealings connected with land, by reducing the enormous delay and expense now attending them; and who, by so doing, we believe, will serve their own interests as much as they will benefit the dealers in land. It cannot be disputed that one source of the present evils now pressing on the transfer of land is the practice of employing (and of course paying) in many cases two practitioners instead of one. The mystery of conveyancing is so great, that in most important matters not only counsel must be consulted, but a peculiar kind of counsel; and thus it is that the document known to the suitor by the familiar name of *the Bill* assumes its tremendous character. Let us see then — by the help of our author, known to be the late Mr. Groom, a very learned person, and perfectly conversant with conveyancing, — whether two persons were always necessary to effect a conveyancing transaction.

Prior to and in the year 1729, when the first Act was passed for placing attornies on their present footing, Mr. Groom says that "conveyancing was not the proper business of attornies, but was conducted by *scriveners*, and by barristers who were employed by the parties concerned, *without the intervention of an attorney*." As evidence of this, Curle's case (20 Jac. I., Winch, 40.) is cited, when Hobart, C. J., held that to say of an attorney that he had made false writings was not actionable, "for it doth not appertain to an attorney to make writings, and so it is no scandal to him in his profession." And also Godsall's case (22 Jac. I., Winch, p. 90.) to the same effect.

Mr. Groom then quotes from Roger North, in reference to the practice of Lord Guildford, where it is said that he practised as a conveyancer, not only receiving instructions direct from the parties, but also engrossed the deeds himself. (See Life, vol. i. p. 142.)

The Acts for regulating the admission of attornies are then referred to; and it is said that, "so far from its having been an object of the Legislature to give to attornies any right to supersede the practice of the scrivener, the confining five years of their youth to a different pursuit, is the strongest possible argument against any such intention."

The scrivener, however, was, in course of time, superseded by the more active attorney; and the whole case is gone into in a Report of the Scriveners' Company in 1748, quoted at length by Mr. Groom, in which it is said that "the proper business of a scrivener was to make charters and deeds concerning lands, tenements, and inheritances, and all other writings which, by common law or custom of the realm, were required to be sealed;" and that "scriveners were till of late years considered to be so far from having any connection with *attornies*, that the art or mystery of the *former* was looked upon and made use of as the means of preventing as much as possible all manner of occasion for applying to the *latter*." (P. 23.)

In 1794, however, according to Mr. Groom, the attornies had been so industrious as "to unite in themselves the business of the scrivener and the business of the attorney, to such an extent, that they had almost annihilated the scrivener, and had succeeded in attaching to the name of scrivener an idea of a person disreputable and contemptible, and had effected the exclusion of all counsel from the practice of conveyancing *as the direct and immediate agents of the parties*." (P. 25.)

And it is here said in a note: "At a club of attornies, called 'The Law Society,' consisting of several hundred members (including the greater part of the respectable attornies of the metropolis), which was instituted about the year 1749 or 1750, and which has for its professed object the preservation of the privileges of the order, any conveyancing counsel, who is known either to have prepared legal instruments without the intervention of an attorney, or to have admitted parties to a *direct personal intercourse in business without a similar intervention, is regularly DENOUNCED*."

And further on it is said: "The attornies have succeeded, gradually, in establishing this encroachment, veiling their pretensions under the term 'professional etiquette.' It should have been stated that within the last sixty or seventy years a considerable portion of the most important conveyancing business of the country was transacted, without the intervention of attornies, by barristers, or by persons considered to practise as counsel, though not at the Bar. Among the latter may be included a great number of Roman Catholic gentlemen of the greatest respectability, who, before the statute 31 Geo. 3. c. 32., were debarred from practising as counsel in the Courts. How common it is to find *that associations of men formed for the protection of their own rights end in encroachments on the rights of others.*" (P. 25 n.)

This certainly is pretty well. The attornies appear to have taken away the conveyancing business from the scrivener and the barristers; and to have made the one contemptible, and to have DENOUNCED the other if they only conducted in the fashion of their ancestors what seems to have been their peculiar business; and this, it seems, was followed up by a publication headed, "On the modern *Innovations* in the Practice of the Law by the Employment of certificated Conveyancers," which thus ingeniously attempted to turn the tables on the worthy counsel who had acted in conformity with the practice of Lord Guildford, Sir Orlando Bridgman, Sheppard, and others, supported by such men as Booth and Duane, down to the commencement of this century.¹ If, then, conveyancers are pack-horses, and like not to go out of their old roads², it will be seen that for about forty years only they have departed out of the ways of their legal forefathers; but that prior to that period conveyancers, whether at the Bar or otherwise, have been consulted by and taken business from the client *directly*, and without the intervention of an attorney.

This being indisputable, it remains briefly to inquire whether it is desirable for the public that the practice acted on so long, and only partially discontinued for so short a period, should be adhered to and completely restored?

As to this, it is proper to observe that this is just that portion of Professional practice that could be completely transacted without resort to the attorney, and as to which he is in no way protected by statutes. On the contrary, the practice of conveyancing "by *serjeants-at-law, barristers, solicitors, &c.,*" is recognised and protected by the Stamp Acts. We therefore do not hesitate to say that it is worthy of the gravest consideration whether the fancied etiquette, the origin of which is noticed by Mr. Groom, may not be, to this extent safely and advantageously to the client, altered and abolished.

¹ See as to this, 1 L. R., p. 395., "Early History of Conveyancing," and 2 L. R., "Life of Charles Butler, Esq.," written by his Grandson, Henry Stonor, Esq.

² Life of Guildford, p. 142., who said, that "of the community of conveyancers, some were pack-horses, and could not go out of their road."

ART. III. — CODIFICATION. — LETTER FROM
MR. CAMERON.

To the Editor of the Law Review.

SIR,—Your Review has done such good service in the beneficent and now rather successful cause of Law Reform, that I am anxious to obtain a place in it for the accompanying Petition, which I presented to the House of Lords as soon as I heard that the Committee on Indian Affairs was appointed.

The prayer of my petition¹, so far as regards Law Reform,

¹ Mr. Cameron's petition is as follows:—

To the Lords Spiritual and Temporal in Parliament assembled.

The humble Petition of CHARLES HAY CAMERON, late Fourth Member of the Council of India, President of the Indian Law Commission, and of the Council of Education for Bengal, humbly sheweth:—

That your Petitioner was appointed a Member of the Indian Law-Commission in the year 1834, and continued in that body as Member, or President, until the year 1848.

That in the course of the years intervening between 1834 and 1848, the Law-Commission sketched out a system of Law, and of Judicial Establishments, and Procedure, for British India, whereof the following parts have been fully elaborated and reduced into the form of Acts of the Indian Legislature—

A Penal Code.

A Plan of a Model Criminal Court.

A Plan of Criminal Procedure.

A Plan of a Model Civil Court and of Civil Procedure.

A Plan for the abolition of the Recorder's Court in the Straits of Malacca, and for the constitution of an improved Judicature there.

A Law of Prescription and Limitation.

A Lex Loci for British India.

That, so far as your Petitioner knows, the Home Authorities have not felt themselves in a condition to pronounce a decision upon any one of the above Propositions, except the plan of a Model Civil Court and Civil Procedure.

is, as you will see, that the works of my colleagues and myself in the Indian Law Commission should "be submitted

That, so far as your Petitioner knows, the Legislature of India has not felt itself competent to pronounce a decision upon any one of the above Propositions.

That in the Reports by which the Law-Commission explained and justified the Propositions above enumerated, and in various other Reports, they have discussed a great number of important Questions of Jurisprudence.

The fusion of Law and Equity.

Special Pleading.

Appellate Judicature.

Small Cause Judicature and its fusion with general Judicature.

The Jury, or the Association of the Public, with the business of Judicature.

The training of Candidates for the Judicial Office.

That the labours of the Law-Commission which (whatever may be their intrinsic value), have cost a great deal of public money will, as your Petitioner apprehends, be lost to the people of India, and that the similar labours of any persons, who may be appointed to complete the task imposed upon the Law-Commission by Parliament in the statute 3 & 4 Will. IV. c. 85. ss. 43—55., will in like manner be lost to the people of India.

Your Petitioner, therefore, prays —

That the above-mentioned Propositions and Discussions of the Law-Commission may be submitted to the consideration of competent Jurists, who may decide whether the recommendations of the said Commission are, or are not, fit to be adopted.

That as President of the Council of Education for Bengal, your Petitioner had opportunities of observing the desire and the capacity of large numbers of the Native Youth of India, for the acquisition of European Literature and Science, as well as the capacity of the most distinguished among them for fitting themselves to enter the Civil and Medical covenanted Services of the East India Company, and to practise in the learned Professions.

That the said Native Youth are hindered from making all the progress they are capable of in the acquisition of the said Literature and Science.

First, Because there is not in British India any University with power to grant degrees as is done by Universities in Europe.

Secondly, Because the European Instructors of the said Native Youth do not belong to any of the covenanted Services of the East India Company, and do not, therefore, whatever may be their learning and talents, occupy a position in society which commands the respect of their Pupils.

Thirdly, Because no provision has been made for the education of any of the said Native Youth in England without prejudice to their caste or religious feelings.

Your Petitioner, therefore, prays —

That one or more Universities may be established in British India.

to the consideration of competent jurists who may decide whether the recommendations of the said Commission are or are not fit to be adopted."

The causes which, with one exception, have prevented the Council of India, and the Home Authorities from coming to any decision for or against the recommendations of the Law Commission, are set forth, so far as the reserve incident to official revelations would permit, in the evidence which I delivered to the Committee of the House of Lords; and I will not trouble you with any repetition of them.

But I look upon the LAW REVIEW as the principal organ of English Law Reform, and the object of my letter is to communicate to those who take an interest in that movement, so much of the plans of the Indian Law Commission as relates to what is of English origin in the law and judicature of India.

You are aware that the English law is the *Lex loci* of Calcutta, Madras, Bombay, and Penang with its judicial dependencies; and that the Supreme Courts of the three Presidencies and the Court of the Recorder of Penang are organised, with more or less of modification, upon English principles.

If, therefore, the Indian Law Commission had been ever so much disposed to abstain from criticising the legal institutions of the mother country, we should really have found ourselves unable to exercise such abstinence. We did criticise them very freely; and possibly, in so doing, we have raised up a sort of opposition to our projects which we might have escaped if it had been possible to confine ourselves to the examination of Hindoo institutions, or Mahomedan insti-

That a covenanted Education Service may be created analogous to the covenanted Civil and Medical Services.

That one or more Establishments may be created, at which the Native Youth of India may receive in England, without prejudice to their caste or religious feelings, such a secular Education as may qualify them for admission into the Civil and Medical Services of the East India Company.

And your Petitioner will ever pray.

(Signed)

C. H. CAMERON.

tutions, or institutions devised from British India and not copied from the sacred exemplar of Westminster Hall.

One of the antagonists of the Law Commission, Sir Henry Roper, late Chief Justice of Bombay, concludes the observations, which, on the 10th of January, 1845, he communicated to the Government of India, in the following words:—

“I have no doubt that if the proposed changes be salutary for India, it would be at least equally salutary for England, to effect similar changes in that country, and therefore there is reason to believe that these propositions of the Law Commissioners will be duly canvassed by competent jurists before their adoption in India is permitted.”

I quite agree with Sir Henry Roper that it would be at least equally salutary to effect for England changes similar to those which the Law Commission has proposed for India; and when we were engaged in recommending and enforcing those changes for the greatest of British dependencies, I acknowledge myself to have felt the ambition of setting an example which might possibly be thought worthy of imitation at the seat of empire. It appears to me that this was not an ambition which I need be at all ashamed to avow, and I really do not now feel anything like remorse for having suffered it, without effort at suppression, to animate my exertions. The conspicuous honour of setting that example was indeed denied to us. But the inferior honour of having been the first to propose for any country ruled by the sceptre of Queen Victoria, that great judicial reform which is now about to be adopted in the heart of her dominions, belongs to us, and cannot be taken from us.

Lord Eldon, never to be mentioned without respect when we advert to his vast legal attainments and judicial capacity, said of the separation of Courts of Law and Equity, “It mainly contributes to the complete and effectual administration of justice in this country, and secures to the people an administration of justice to an extent and in a degree such as are unknown, and must be ever unknown, where that separation is not effectually made and observed.”

The Indian Law Commission, after examining a number of cases to illustrate Lord Mansfield's views on this subject, and

oting an anecdote related by Roper of Sir Thomas More, concluded their report of February 15. 1844, in these words:—

“ Upon the perusal of this anecdote, the somewhat melancholy reflection naturally suggests itself to the mind, that if the great Chief Justice, whose doctrines we have been endeavouring to rescue from unmerited obloquy and to bring into practice under the sanction of legislative authority, had been contemporary with the great Chancellor of whom the anecdote is related, and his fellow labourer in the formation of our judicial system, the boasted antagonism of Law and Equity which is peculiar to it, would at this day have been altogether forgotten, or would have been remembered only as an antiquated barbarism, scarcely to be explained by the rudeness of the times in which it had its origin.”

So great is the change which has been going on in the minds of English jurists in the course of the last half century, that although perhaps not many men who have studied the subject would be prepared to give an unqualified assent to the doctrine of the Indian Law Commission, I venture to affirm that not one such man can be produced who will give that sort of assent to the diametrically opposed doctrine of Lord Eldon.

But a phenomenon has lately appeared of more immediate importance than the progress of opinion among speculative men. I mean the Report of the Chancery Commission.

I have read it with infinite satisfaction for many reasons, not the least of which is the striking analogy between the immediate practical measures recommended by that Commission and those which were long ago recommended by the one over which I presided.

The Chancery Commissioners thus describe the immediate, but partial remedy which they propose for “ the mischiefs which arise from the system of several distinct courts, proceeding on distinct, and, in some cases, on antagonistic principles.”

“ We have arrived at the conclusion, that without abolishing the distinction between Law and Equity, or blending the Courts into one Court of universal jurisdiction, a practical and effectual remedy for many of the evils in question may be found in such a transfer, or blending of jurisdiction, coupled with such other practical amendments as will render each

Court competent to administer complete justice in the cases which fall under its cognisance. We think that the jurisdiction now exercised by Courts of Equity may be conferred upon Courts of Law; and that the jurisdiction now exercised by Courts of Law may be conferred upon Courts of Equity, to such an extent as to render both Courts competent to administer entire justice without parties in the one Court being obliged to resort to the aid of the other."

The immediate partial remedy which the Indian Law Commission recommended in 1844 for the same mischiefs, is thus explained in the beginning of their report:—

"The second respect in which the Courts existing in the Presidencies are very unfit models, is that the rules of law which are called Law, and the rules of law which are called Equity, are administered by two different jurisdictions.

"In the result we contemplate the administration of all the substantive law of the country, put into the form of Codes, by one system of Courts.

"But it seems clear to us that the rules of law which are called Law, and the rules of Law which are called Equity, should in their present condition be administered by one system of Courts in the Presidencies, as they already are in the Mofussil. On account, however, of the magnitude of this experiment, and on account of the high authorities which may be vouched against it, we propose to proceed by steps.

"We propose only to give to our new Court power to administer complete justice, that is to administer Equity as well as Law, in all suits within its jurisdiction; and we propose that its jurisdiction shall be concurrent with, not exclusive of, *the jurisdiction of the Supreme Court in actions at law*, leaving to the Supreme Court alone for the present all the rest of its equitable jurisdiction.

"We ourselves feel perfectly confident of the success of our experiment; but confidence of the success of such an experiment cannot be attained without long and careful reflection; the public, therefore, cannot be expected fully to share it.

"But proceeding as we propose by steps, all that can be imagined to be put to hazard by failure, is of trifling value compared with the benefits to be attained by success.

"For suppose that, as we expect and intend, the suitors at law should be drawn away from the Supreme Court by the greater cheapness and simplicity of the new procedure, and the faculty of examining the adversary; and suppose further that, contrary to

our expectations, the new judicature, original and appellate, should not appear to those who may watch its operation with a view to the interests of justice, to be a powerful instrument for the discovery of truth, and for the correct application of the rules of substantive law, then the whole of that large portion of Equity which is not consequent upon a suit at law, would remain untouched, and if ever reformed at all, would be reformed in some other way. The whole machinery would be left standing, and the portion of Equity and of Law drawn away by our new Court, would revert to its original condition.

“On the other hand, if the experiment should, as we venture to foretell, be completely successful, the Government could then proceed with the greatest confidence to provide that the new Court should entertain all suits in Equity, whether based upon previous proceedings at law or not.

“In like manner, and for the same reason (*viz.* the doubt which may be felt by the reflecting portion of the public as to the success of our experiment), we do not recommend the abolition of the Common Law jurisdiction of the Supreme Court. We believe that such a measure might be unpopular, and we think that our object may be attained in a gentler way, and without shocking any prejudices, by allowing the two systems to subsist together. We do not even intend to protect the jurisdiction of the new Court by enacting that no one who sues at law in the Supreme Court shall recover costs.

“If this plan is adopted, there will be two roads open at once by which the suitors of the Presidences may obtain the great benefit of having the profound learning of the Judges of the Supreme Court applied to their affairs.

“To disentangle transactions which the ignorance, negligence, and fraud of mankind have complicated, and to refer each essential part of the transaction to the principles of law or jurisprudence which ought to govern it, must always be the subject-matter of a science and an art. It is in vain to expect that this science and this art can be fully mastered without long and arduous discipline. That discipline the Judges of the Supreme Court have gone through, and it is because of the high value we set upon their science and art that we are so anxious effectually to open the advantages of them to the public.

“When these two roads are open at the same time, it will be very instructive to observe what sort of causes are carried by the old road and what sort by the new. Our own belief is, that in no

long time it will become disreputable to sue at law in the Supreme Court. It will soon be understood that a plaintiff who prefers bringing his action there, is a man who is afraid of being personally examined as to the truth of his case; a man who shuns equity and good conscience; a man who wishes to entangle his adversary in the meshes of written special pleadings, and to have his cause decided upon some point foreign to the merits of it.

"In this state of things we of course expect that the Common Law jurisdiction of the Supreme Court will wither away in the presence of its rival, and that the Legislature will shortly be able to abolish it without exciting alarm or regret."

Of these two instalments of Law-Equity Reform I venture to prefer that tendered by the Indian Law Commission. I hope I may say this without presumption, since I attribute, what seems to me, the superiority of the Indian proposition to the circumstance, that the entire field of Law Reform, the remodelling of the whole substantive and adjective Law of the country, was entrusted by Parliament to its authors, while in England Law Reform has been referred in fragments to separate Commissions, and only the fragment relating to the Court of Chancery has fallen to the lot of the Commissioners, from whom the corresponding proposition has emanated. I venture to prefer the Indian proposition, not only for India, but also (with the necessary modifications) for England; because in the latter application, as in the former, it is fitted to take its place as an essential part of a comprehensive and complete system.

The main feature which distinguishes our proposition from that of the Chancery Commissioners is, that the Court, which is to be invested with blended legal and equitable jurisdiction, is not the Supreme Court, but a subordinate one. We wanted the Supreme Court of Calcutta as one element of a high Court of Appeal from all the tribunals of the country.

The plan of administering justice by Local Courts of first instance with an appeal to a great metropolitan tribunal, already has place in India; but it does not extend to the Presidency Towns, where the so-called Supreme Courts administer justice as Courts of first instance, with no other appeal

than the very inconvenient and expensive one which lies to the Privy Council in England. Wanting the Supreme Court as part of a high Court of Appeal, we could not afford to reform it with a view to its greater efficiency as a Court of first instance.

Now this is what the Chancery Commissioners propose to do with regard to the Court of Chancery. Considering the limited range of their Commission, they had scarcely any choice in this matter. But if an English Commission had been created with a field of action as extensive as that assigned to the Indian Law Commission, I should not have despaired of convincing such a Commission that the most desirable instalment of Law-Equity Reform would be to arm the County Courts with all the equitable powers necessary to enable them to do complete justice in the cases which come before them, extending at the same time their jurisdiction over all the subject-matters of actions at Law, and abolishing the pecuniary limit by which it is restricted.

I see no objection to the plan of giving Law Reform by instalments, provided that each instalment fits into the place of some distinguishable part of the institutions which actually exist, and is at the same time a distinguishable part of some general system which the Reformers have in view. The objection to what has been called bit-by-bit Reform (and no one can feel that objection more strongly than I do) is, that the bits, whatever merit each of them may have, are not correlative parts of any preconceived organic whole.

What organic whole is contemplated by the Chancery Commissioners, they have not yet disclosed.

"It has been suggested (they say) that the remedy for these evils would be to remove all distinction between Law and Equity, and to blend the Courts into one Court of universal jurisdiction.

"A change of such magnitude requires great consideration, and we propose fully to discuss the subject in a future Report."

I wait with much interest and anxiety the arrival of this promised Report, but I fear that the plan of the Commissioners, which is to be disclosed in it, cannot possibly, by reason of the narrow limits of their Commission, be of so comprehensive a nature as they would themselves have desired.

In the mean time I quote a passage in which they set forth some of the difficulties of the subject; after which I will proceed to show in what way provision would be made for those difficulties in the general scheme of the Indian Law Commissioners.

“ With reference to the proposal to blend the Courts into one Court of universal jurisdiction, it will be obvious, on considering the different subject-matters of which Courts of Law and Equity are ordinarily required to take cognisance, that there must be different modes of procedure with respect to some of these matters; a necessity which arises, not from any technical rules, but from an inherent difference in the nature of the subjects to be dealt with. For example, in the administrative branch of equitable jurisdiction, which is sometimes to be exercised in a hostile suit, but more frequently in a suit for protection and administration merely, the Court is called upon to take care of the person and property of an infant, and to make orders, and give directions during a long course of years; or is required to administer the estate of a deceased person, in doing which creditors are to be ascertained, assets to be got in, and orders are to be made, and directions given, from time to time, as to the property, and its distribution amongst various classes of parties having different interests. In matters of trust, the Court frequently has to ascertain the conduct and acts, as well of all the persons in a fiduciary position as of all their cestuisque trust, and to adjust the several claims and liabilities, making all just allowances under the special circumstances of every transaction. A machinery to effect these objects is required, and must therefore be retained or provided. It is obviously impossible that these cases can be resolved into one or more questions to be submitted to a jury. On the other hand, the machinery of a Court of Law is applicable where one party seeks to recover from another a sum of money or specific goods, or land, in which cases there is a simple judgment that the plaintiff recover, or that he fail, and the Court has no directions to give in the nature of a decree; again, in criminal cases, revenue prosecutions, the prerogative business of the Court of Queen's Bench, actions of tort, and actions for damages, cannot be satisfactorily dealt with in any other mode than by a Court employing the present or some similar machinery, and ascertaining matters-of-fact before a judge and jury.

“ The principle of both these modes of procedure must be preserved, whether they are to be administered by distinct Courts, or by one Court proceeding in different modes, according to the

difference of the subject-matter. If the distinction in the procedure be preserved, the union of Equity and Common Law Courts would seem to effect a change more nominal than real."

But when you have, according to the recommendation of the Commissioners, rendered "each Court competent to administer complete justice in the cases which fall under its cognisance," or in other words, when you have made each Court a Court of Law as well as a Court of Equity (for that is what it comes to), it would surely be absurd to go on calling one a Court of Law and the other a Court of Equity, merely because one is to take cognisance of cases which can be resolved into one or more questions to be submitted to a jury, while the other is to take cognisance of cases in which it may have to make orders and give directions during a long course of years. Whatever else may be the proper mode of designating the distinction which the Commissioners think must be preserved, it is quite clear that to use the phrases "Courts of Law," and "Courts of Equity," is not the proper mode.

But waiving this question of nomenclature, I do not think with the Commissioners that, if the distinction in the procedure be preserved, the union of the last sort of Courts with the first sort would seem to effect a change more nominal than real.

I do not dispute that causes admit of classification not only theoretically for the purpose of making them distinct objects of contemplation to the mind, but likewise practically for the purpose of distributing them among the several Judges. This distribution, however, may be effected in various ways, and the problem is to find the way in which it may be effected with the least inconvenience to the public.

In the opinion of the Indian Law Commission there ought to be in every district a Court or Office of Justice. The number of Judges in it must be decided by the quantity of judicial business to be transacted. In a thinly peopled agricultural district one Judge would probably be enough for the whole business, and no distribution of suits would be required. In a metropolitan district several Judges would be necessary. Each of these Judges would have in point of

Law jurisdiction over all classes of suits, and no proceeding taken in any suit before any one of these Judges, would ever be void on the ground that it was *coram non Judice*. No suitor would be called upon at his peril to select the right Judge, and punished by the nullity of his proceedings, if he happened to select the wrong one. The distribution of suits would be made by the Court itself, upon considerations of convenience, and every suitor entering the Court, whatever might be the nature of his demand, would have indicated to him the Judge before whom that demand ought to be enforced.

In this manner it appeared to us that all the advantages of classification might be obtained without the risk of the suitor being told at the end of sixteen years' litigation (as happened in a case before the Supreme Court at Calcutta) that he has come to the wrong Court, and must state and prove his whole case over again in a different form before the right one.

I propose, then, to have local Courts all over the country in which the suitor shall be sure of finding his remedy, whatever may be the nature of the wrong he complains of.

But it must not be supposed that I contemplate, still less that I desire, any such consequence as the destruction of Westminster Hall. An administration of law by local Courts would very soon degenerate into a mere system of Arbitration, if it were not preserved from that corruption by the antiseptic power of a general Court of Appeal. I know there are some who have been driven by contemplating the evils of our centralised and technical system, to believe that a general system of Arbitration is to be preferred to a general system of Law and Legal Procedure. But this is very far from being my opinion. To Westminster Hall I look for the preservation of the uniformity of Law and of Procedure. I would give to the great Court, whose seat should be in that venerable sanctuary,—Universal Appellate Jurisdiction, and universal supervision over the whole administration of justice. Neither the time nor the space at command permit me to enter into detail. I can only say in general that the above-mentioned high functions should be exercised partly at

Westminster, and partly on circuit. I believe that the English circuits, though mischievous in respect that they have superseded local tribunals, have in other ways conferred immense benefit upon the country.

To them, in a great degree, is owing the comparatively slight difference in civilisation between the remotest districts of England and its metropolis.

No doubt, the facilities of travelling must also be taken into account, but in this matter there has been action and reaction. The Metropolitan Judges and Bar have been able to visit the most secluded provinces because there have been passable roads. But it is also true, that roads have been made passable in order that these journeys might be accomplished. If great functionaries, and men of the highest and most cultivated intellect circulate twice a year through the provinces, and then return to their station at the capital, they learn the wants of the extremities and make them known at the centre; and they exhibit at the extremities the modes of conducting business, and even more generally the modes of thinking and behaving, which are approved at the centre. If ever the plans of the Indian Law Commission should find favour in the eyes of those who have power, I believe that Circuits performed by the Metropolitan Judges and Bar will play a conspicuous part in the civilisation of India. In England the work of general improvement is done. Cumberland and Cornwall can never be much behind Middlesex in all that contributes to the comfort and the adornment of life. But in the special field of Law and Procedure the desirable uniformity cannot be preserved, the desirable stimulus cannot be imparted, a national ambition cannot be substituted for a provincial ambition, otherwise than by Circuits. Local Judges instructed by Metropolitan Judges, both in the way of precept and example, will ever be the best administrators of justice. The Judges of Appeal, too, whose seat is at Westminster, require, for the sake of their own efficiency, to be engaged in the occasional exercise of original jurisdiction. Let them try, then, sitting singly, the few most important causes in London and Mid-

dlex, and let them try on Circuit the few causes which are fit to be reserved for them by reason of importance, and which can be so reserved for them without inconvenience to the parties. I am aware that the absorption of the original jurisdiction of the Courts at Westminster by the County Courts, is looked upon by a Committee of the Society for promoting the Amendment of the Law (a Society in which, since my return to this country, I have had the honour to enrol my name), as "a most disastrous, but not unlikely event." But the Committee look on the event as disastrous, because they look on it as a transfer of "the administration of justice to tribunals whose procedure is very imperfectly organised, and to Judges of whom it is no disparagement to say, that however competent they may be to discharge their present duties, they are quite unequal to the task of undertaking the summary administration of the whole Law of England."

If a sufficient number of Judges competent to this task could not be found, and if their tribunals could not be adequately organised, I should not only sympathise in the feelings of the Committee, but should give my assent to their conclusion. Believing, as I do, that both these conditions can be fulfilled, and therefore withholding my assent from the conclusion of the Committee, I nevertheless do sympathise with their feelings. I am convinced, however, that those feelings, notwithstanding the sympathy they excite in me, are but a vain yearning for the restoration of an irrevocable past — I therefore gladly avert my eyes from that retrospective view, that I may look forward with hopeful aspiration to a possible future for Westminster Hall, so full of utility and dignity, as to be no-wise unworthy of its ancient and well-earned renown.

If you care to know in what way it appears to me that the County Courts might be completely organised, and in what way a constant supply of competent Judges might be provided for them, I shall be happy to send you at some future time a communication on this subject. Even if I had not already trespassed too long on your indulgence, the

technical details with which such a communication must abound, would make it an incongruous addition to this letter.

I have the honour to be, Sir,
Your most obedient servant,
C. H. CAMERON.

East Sheen, July 30. 1852.

ART. IV.—JAMES REDDIE, LL.D.

THE History of the Legal Profession records very few examples of eminent faculties more usefully employed or of solid learning more amply acquired and more ably applied, than that of the late Mr. Reddie. Although the accident of his early retiring from the Bar to an important though a provincial judicial office prevented him from rising to the more exalted stations of the magistracy, his life affords matter of useful meditation to both the student of Law and the practitioner; and to dwell upon it at its close is in an especial manner incumbent upon us, who were his colleagues in furthering the great work of diffusing legal knowledge and promoting the amendment of the Law.

He was born about the year 1773, the youngest son of a highly respectable family in the town of Dysart, friends of the St. Clairs, of Dysart, to whose head, the late Lord Rosslyn, Mr. Reddie inscribed the Thesis which he published and nominally defended, according to the practice of Scotland, when called to the Bar of that country, in 1797. We say *nominally*, for though the publishing a Civil Law Thesis is still required of the Advocate, after he has passed an examination first in the Roman and then, a year after, in the Scotch Law, the defending its positions has long been only nominal¹, the examinations themselves having also become next thing to a name; as the examiners, nine on the Roman

¹ We believe this is not a mere form at the present day.—Ed.

and seven on the Scotch Law, almost invariably inform the candidate on what titles (nine and seven respectively) their questions are to turn, so that a few days' reading will suffice to make the answers an easy matter.

He had been educated at the High School of Edinburgh, and we have heard Lord Brougham and others who, though considerably younger than Mr. Reddie, were his class fellows, describe the reverence with which he was regarded as so immeasurably their superior, that, during the four years of the curriculum, no one ever for an instant approached him, or even thought of making the attempt; although it is certain that he began at the same point and time with them, having had no previous instruction, and only being prevented by bad health from commencing his studies earlier.¹

At the University he studied under the great men who then adorned that seat of learning: Stewart, Playfair, Robison, Black; and before he confined himself to the learning of his profession, he acquired an extensive and accurate knowledge of other sciences, physical as well as moral. His study of Law, too, was conducted on scientific principles. He began by passing some time at the College of Glasgow, to benefit by the instructions and the conversation of the justly-celebrated Professor Miller. While he applied himself to acquiring a knowledge of the Civil Law, he bestowed much of his attention on subjects connected with general jurisprudence, and it is probable that he was one of the very few professional men in either Scotland or England who ever came to the study of the Municipal Law after an ample preparation by the examination of the legal principles common to all systems.

When he entered more minutely into the study of the Scotch Law, and for some time after he came to the Bar, he continued to occupy his leisure hours with philosophical and literary subjects. He took an active and most useful part in the select societies which were formed in Edinburgh for pursuing such inquiries; and no one can read with attention his

¹ We have seen it stated that Lord Brougham was at the head of the school when he left it in 1791. This is true; but Mr. Reddie did not remain to that year; he had left it in 1790.

valuable works on Jurisprudence without perceiving the many traces both of general philosophical habits and of much scientific knowledge. Seldom, if ever, did any one enter upon the study of our profession with a mind so fitted to master its peculiar learning, or engage in its business with more resources for applying that learning to practice.

Mr. Reddie began his professional life without any patron or party to rely upon, or any recommendation but his own great learning, solid though not brilliant talents, and a sound judgment, which well fitted him alike to advise a client and to conduct his cause. In the course of two or three years his extraordinary merit became known, notwithstanding his modest and retiring nature; and Mr. Hope, then Lord Advocate, afterwards Lord President, distinguishing him among his contemporaries without any regard whatever to the differences of his political opinions, contributed greatly to his professional success. It was in some prize causes, which involved the questions of neutral rights so much agitated towards the close of the first Revolutionary war, that he became first known in the Court, and showed himself not more deeply versed in the doctrines of public (sometimes now termed *international*) Law than capable of close and logical reasoning in their application. His argument on the right of search connected with the case of the *Flad-Oyen*, was very long remembered at the Scotch Bar, and at once pointed him out for advancement in the Profession.

Nor can any doubt be entertained, that had he continued at the Bar the highest place both in practice and ultimately on the Bench would have been within his reach. This was held by all men, save one, of every party, as an incontestible proposition; but his own modest and little adventurous nature led him to prefer an humbler path, and he listened to the suggestion of his friends at Glasgow, whom he permitted to propose him as a candidate for the respectable and very important offices of Town Clerk, the Assessor of the Magistrates, and Presiding Judge in the Town Court—the principal Civil Court of that great commercial city. As soon as it was known that he was willing to take the office, the other candidates, six in number, all professional men of eminence

—one of them Sheriff of the County, another Professor of Law in the University—retired from the contest, and he was chosen unanimously. He entered upon the duties of this office in 1804, and until 1822, when by the appointment of a resident sheriff many causes were removed into that Court, the number that came before him, including the small debt jurisdiction, was nearer six than five thousand a-year, of which many were of great importance in principle as well as value, the jurisdiction being unlimited in amount, and in every kind of personal action. The satisfaction which his judgments gave was almost unexampled,—they were rarely appealed from, most rarely altered upon appeal. In affirming one of those which ultimately came before the House of Lords (1833), the Lord Chancellor observed, “That it well became even the most eminent Judges upon the Bench to approach with the greatest caution and deference a judgment upon a point of law pronounced by so distinguished a lawyer,” and this remark met with the universal concurrence of the profession.

Although the labours of his office necessarily occupied time to the exclusion of other pursuits during the greater portion of the year, he yet had continued from the first to employ his hours of relaxation and the short vacation which the sittings of the Court allowed, in the perusal of works on general jurisprudence, and the examination of questions connected with its various branches. But the time which he could thus bestow was, of course, scanty, and he could do little more than keep up his acquaintance with the subjects. When, however, the new arrangements of 1822 altered in the course of a few years the distribution of business, and relieved him from a considerable portion of his duties, he profited by the command of time which this gave him to prepare three most able and learned works, with which he enriched the library of the lawyer. In 1840 appeared “*Inquiries Elementary and Historical in the Science of Law*”—which in 1842 was followed by a continuation under the title of “*Inquiries in International Law*.” In 1841 he had published “*An Historical View of the Law of Maritime Commerce*”—and in 1845 appeared his greatest work, “*Researches*

Historical and Critical in Maritime International Law," of which it would be difficult to say whether the profound legal views and legal learning, or the extensive historical knowledge that it displays be the more worthy of admiration. It received the unqualified praise not only of his own professional brethren, but of Mr. Savigny and the other eminent Jurisconsults of the Continent. Let us add, that the pages of this Journal have been enriched by his researches in a manner justly calling for gratitude from ourselves and our readers. It would not be easy to point out more able and learned discussions than some of these pages contain; as the series of articles on International Law¹; nor more interesting and even entertaining historical details than others present to the student and the legal antiquary, as that on the life and writings of Savigny.²

It may most justly be said that he is the greatest benefactor to legal science who has appeared for many years: and that, had his judicial labours been laid out of view, his eminence among its cultivators would have entitled him to a place in the very highest rank. But it is important, because it is most useful, to consider his speculations in connexion with his practical labours. We find that they were kept in completely harmonious consistency with each other; that the legal Philosopher was all the time an acting Judge; that the same person who was laboriously occupied in discussing the grounds and defining the limits of the rules which govern the mercantile intercourse of nations, was as laboriously engaged in dispensing justice among suitors, settling the rights of bill-holders, examining the obligations of guarantees, sifting the claims of partners, ascertaining the title to chattels, possibly of very trifling value, awarding compensation for injuries to personal property; in short, dealing with every variety of transactions between man and man, trader and customer, or trader and trader, which can arise in a densely crowded commercial capital. We draw from hence the inference that they, calling themselves true practical men,

¹ 9 L. R. 22. 260. 10 L. R. 261, &c.

² 5 L. R. 1—8. 278.

are most grossly deceived, who look down upon speculative lawyers as unfit to mix in the concerns of the world, and regard the persons most conversant with legal principle, the students of Jurisprudence, as unsafe advisers in the practice of the Law, and unfit guides to the lawgiver in his efforts to amend it.

Mr. Reddie's constitution was far from robust, and he never enjoyed an uninterrupted health; so that his powers of labour were only sustained by his habit of resolute application, his uniform temperance, and his naturally calm disposition of mind. During the last two or three years he suffered more from the infirmities of advanced life, and was obliged to pass a considerable part of his time in the retirement of the country. This, however, did not put a stop to his literary exertions, although it prevented him from attending in Court to the general business of his office. He retained almost to the last the entire possession of his great faculties; and died in the bosom of his family, on the 5th April, 1852.

In his private character he was as much to be respected for his perfect integrity and nicely honourable principles as he was to be beloved for the gentleness of his nature. He enjoyed, in a rare degree, the esteem of his fellow-citizens; and the confidence and attachment of the corporate body, with which he had for nearly half a century been connected — feelings not interrupted by the lawsuit which he had been obliged to maintain against it for the protection of the rights of his office. The Lord Provost, when he proposed the resolution, expressing the sorrow of the Magistrates and Council for the irreparable loss the City had sustained (a resolution adopted unanimously), concluded in the words of one who, his Lordship said, "had known him long and intimately" — that he had "the rare faculty of never making an enemy and never losing a friend; and had gone down to the grave with a reputation unsullied by a single spot, and illustrated by a thousand gentle virtues." Mr. Reddie had several children, all of them settled in highly respectable stations; one of them, whose loss the country, and especially the Legal Profession, had but lately to deplore, Judge

Reddie, of whom we have more than once had occasion to speak, and whose labours, both here and in the Colonies, and in the East Indies, have proved most valuable to the cause of Law Amendment.

ART. V.—THE PROSPECTS OF THE BAR.—LETTER
FROM LORD DENMAN.

To the Editor of the Law Review.

Sept. 20. 1852.

SIR,—Mr. Cox has conferred an honour upon me by the dedication of his important work¹, which I should have been eager to acknowledge had I not been informed that he is absent on a long continental tour. But he therein has also called upon me for an expression of my sentiments respecting some recent changes, anticipating a course which I am by no means satisfied that it would be right or expedient for me to take. For this reason, I trouble you with a few observations, flowing from the anxious wish I have always felt to assist in the improvement of the Law, and along with it the interest and honour of the Legal Profession.

At p. vii. I find this sentence:—

“My Lord,—I much fear that the glory of the Bar of England has departed, that its sun has set, and that it is doomed to destruction, or to a change of character and position that will be more lamentable than destruction.

“The recent revolution in the manner of administering justice, by substituting local tribunals for the great central fountains of Law in Westminster Hall, combined with the simplifications of procedure that annihilate all those minor fees by which the Juniors of the Bar have been supported hitherto through the inevitable period of probation, will so reduce the amount of employment for Barristers, that their numbers—already too great—will be more

¹ “The Advocate, his Training, Practice, Rights, and Duties.” By Edward W. Cox, Esquire, Barrister-at-law. Vol. I.

than ever disproportioned to the business, and hundreds, nay thousands, must go out of the Profession, or be starved out, before demand and supply can be equalised, and there will be a prospect of even a moderate provision for a few."

Again, at p. x. xi. : —

"Many entertain sanguine expectations that the reforms now in progress in the Courts of Law will restore much of the lost business and even increase it. I cannot share this hope.

"The attractions of the County Courts to suitors who have disputes to try are such as no reform in the Superior Courts could rival. The rapidity with which trials can be heard, the convenience of a hearing on the very day appointed, without the cost and trouble of conveyance of witnesses to a distant place ; the satisfaction of knowing that, when a case is tried, it is settled and cannot be disturbed again and again,—sources of vexation to suitors in the Superior Courts, which more trouble them even than the bill of costs that tell them that justice can be too dearly purchased—these are tangible benefits which suitors will not readily resign. Improve the Common Law Courts as we may, they will never compete successfully with the County Courts in these particulars, and, therefore I entertain but faint hopes of any large revival of business in them ; and certainly I despair of such as will compensate for the fees of the Bar that are swept away by the recent statute, and by which the Juniors subsisted, or were much assisted to subsist, while acquiring the experience necessary for leadership. If Juniors cannot now live by the Bar, whence are to come our future leaders—whence our Judges ?

The inference is drawn in p. xi. : —

"I trust, therefore, that if it should come to a question whether the rule as to taking briefs in the County Courts should be rescinded, your Lordship's influential voice will be lifted up against it."

No juster or livelier description of the benefits that were reasonably expected, and have actually been proved to arise from the establishment of Country Courts, has ever been given. It will, indeed, be unfortunate if their utility shall be found incompatible with the honour and interests of the English Bar. I do not share these fears, nor believe that the glory of that illustrious body depended on such causes, or

that the same qualities which have raised its character hitherto, will at any time fail to command equal estimation with that which it now deservedly enjoys.

It must, however, I think, be confessed that a considerable change is sure to be effected, and that those who have been most laudably anxious to establish County Courts have been somewhat careless in considering their probable collateral effects. The present loss of emolument may certainly bear hard upon individuals, yet, when we consider the items of which it was composed, one cannot but feel some regret that this loss should have been made the subject of complaint. Nothing could be more invidious than for an old barrister to revive the defunct catalogue of side bar rules, of motions of course, and motions to oppose and justify bail, and motions for leave to plead several matters, and rules to show cause why interest should not be computed on notes and bills, followed by motions that the Court would be pleased to make the said rules absolute.

Such was the description of business done, contained in the bill of costs delivered to the client for his information. In fact, there was nothing to tell, except that the attorney had advanced the money to the barrister, and must be repaid it by his client. For the most part no service whatever had been rendered.¹ The guineas and half-guineas were simply law

¹ The opposition to persons tendered as bail was, however, no sinecure. Counsel were employed to protect plaintiffs against being defrauded of a security to which the law entitled them, by what were called *Sham Bail*. Such persons frequented the Courts and the Judges' Chambers, and were hired for that office. Counsel examined them severely as to their means of paying all their just debts, as well as those sought to be recovered in the several actions in which they became bail, but were bound by their answers. They generally passed, even when every hearer was convinced of their insolvency. The scene was a lively one, and formerly was acted before the whole Court: afterwards a single Judge presided, and the three others had a holiday on the Great Bail Day. There was then a separate Court established for this drama, during the performance of which before one of the learned Judges, the other three went through the ordinary routine of duty. This change could not be effected without an Act of Parliament. Finally came the abolition of arrest on mesne process in 1838, and the total extinction of this branch of business. A respectable elderly practitioner, dying soon after, was said to have met his death from a suppression of bail.

taxes. Fees of Court were another set of law taxes, for which some nominal service was done; but the question wherefore these were levied must have been answered by stating that their purpose was to enable the attorney, at the suitor's expense, to put a little money into the pocket of a barrister, his kinsman or his friend. And he had no small proportion of these profits: he made a charge for drawing the brief of instruction to do nothing, and another for waiting on his counsel with the aforesaid brief.

The relief administered to the suitor by repealing the tax is one great and direct advantage to the public: the simplification of procedure, by which the repeal is effected may be described in the same language; but I doubt whether the indirect advantage is not far more valuable than either.

The "minor fees" were twofold, some paid by plaintiffs suing to enforce just claims, recoverable at law, but often not recovered in fact, from the debtors — many more paid by those debtors, as the price of the "Law's delay," which in general quickened and completed the ruin which it had been purchased to avert. If from these not very creditable sources a revenue was collected in the hands of attorneys, for the benefit of poor barristers, I cannot help thinking the cessation of such patronage a great gain to the Bar. But I believe they were much oftener applied to the comforts or luxuries of private connexions and friends among the barristers, with little care for the future prosperity of the profession.

But there is a pressing difficulty of a practical nature arising from the constitution of County Courts. What course is the Bar to take? To insist on the intervention of an attorney in every case, or to be free to accept a brief and instructions directly from the client? To adhere to the etiquette which has prevailed in the Superior Courts, and is tolerably well understood; or adopt some new one, whose working, whose effects, and, above all, whose consequences, are wholly matter of speculation?

To reduce the number of cases in which the question may arise does nothing towards its solution. But if it be true that three fourths of all the causes tried in County Courts are, on both sides, conducted by the parties, without assist-

ance either from counsel or solicitor, here is matter for serious reflection. The disputes which grow out of ordinary transactions seldom involve legal doubts, or require the exertion of professional skill; and the diffusion of improved education has taught men in general a freer use of their own powers of narration and argument. What is called a legal understanding is rarely required except for the discussion of the rules, unavoidably arbitrary, which regulate the descent and transmission of real property, and of those more recondite secrets in the art or mystery of Special Pleading, which the good sense of the late House of Commons virtually extinguished by putting an end to Special Demurrers.

Lord Mansfield advised the student of English Law, with the intention of practising at the Bar, to begin with "Tully's Offices," — the title then given to Cicero's three books, *De Officiis*. A clear understanding of the duties of men in society was considered by him as the true basis of Legal Science. I may cite one of the ablest lawyers of this century who, to strong natural sense united the largest experience, for a similar opinion, — my honoured master, the late Mr. Tidd. I well remember the advice he gave to a pupil, who was about to commence practice: "When you are called upon for your opinion, make yourself perfect master of the facts, and then consider what is *right*. You may be pretty sure *that* is the law, without looking much into the cases."

When once the facts are well ascertained, few persons differ in opinion as to the result of a civil action. But this ascertainment of facts is no easy matter, and here the assistance of the advocate may become all-important. Here is the point at which the question must be asked and answered, — "In what manner and upon what conditions is the advocate's assistance to be afforded?"

Occasionally, at least, eminent and experienced counsel must be called upon to act in County Courts. A rule prevailing in the Profession that barristers should accept briefs in the Superior Courts from no hands but those of an attorney, was incorporated by Act of Parliament into the practice of the County Courts. But in the late Session, when their jurisdiction was extended, a repeal of this provision was at-

tempted in the House of Lords, but failed, a clause having that object was added by the Commons, who probably detected something absurd in the enforcement of professional etiquette by Queen, Lords, and Commons; and besides, might doubt the propriety of maintaining an etiquette which would have necessitated a double outlay by the suitor, and so have run the risk of denying justice to the injured.

If the etiquette cannot be made matter of law, can it be expected to establish itself in this new state of things, by virtue of an agreement, either express or implied, among the members of the Bar? I do not hesitate to declare my opinion, founded on experience as well as reflection, that it cannot, and therefore feel it to be unnecessary to enter on that difficult inquiry, "What practice ought to be agreed on?"

I am sorry to find my answer so unsatisfactory to Mr. Cox's appeal. It is not for want of careful consideration. But the affairs of the world do not stand still while they are under discussion. Pending the controversy respecting the best possible practice, some practice has been actually adopted. What it is, or whether it has been uniform, I have no means of knowing, but I believe we may safely lay this down as a truth:—That all interference of authority with the freedom of actions not in themselves wrong is to be avoided as an evil, and one that most commonly aggravates whatever evil it was designed to correct. The *forum domesticum*, to which the Profession paid allegiance, as a band of brothers, can hardly maintain its authority over a family so widely diffused, so indefinitely multiplied. Without rules the honourable man will act correctly, and none will restrain those of opposite character.

But I will not yet despair of the fortunes of Westminster Hall, which rose with intellectual energy and moral worth, and will not fall by the failure of some accidental but problematical advantages. The numerous seats of judicature in the County Courts are added to the existing rewards of industry and learning, likely, we may hope, to be rendered more attractive by occasional promotions from them to the higher judicial rank. The numerous legal establishments in the colonies greatly multiply the prospects of a respectable posi-

tion and comfortable competency. The aspirant must still support himself during the tedious but inevitable time of waiting for business by some expenditure of capital, if he possess it, by the aid of friends, or by some of the numerous employments that are constantly demanding and remunerating intellectual labour. A greater number of treatises on Jurisprudence, with more philosophical views than have been usual among us, may be expected, and we may confidently predict, that regular attendance at those practical lectures which the Superior Courts at Westminster are constantly reading will be one of the highest recommendations to this and various other offices. All these causes will conspire to preserve that supremacy of character which has induced the Legislature to lodge the supremacy of power with the old-established tribunals of the realm.

Yours respectfully,

DENMAN.

ART. VI. — REMARKABLE TRIALS.

No. II.¹

JAMES STEWART FOR MURDER.²

[St. Tr. vol. xix. A.D. 1752.]

STATE TRIALS have, not inaptly, been termed the Drama of History. They form that finer shading without which history would be little more than a bare outline. From them the historian may deduce unbiassed, because undesigned, proofs of his various statements; they show him the customs, the habits, and manners of private life. Nay, more; from them he may see the motive, aim, and well-spring of indivi-

¹ See No. I., 16 L. R. p. 59.

² We have preferred retaining the Scotch idiom as far as possible. The pages in the margin refer to the nineteenth volume of the State Trials, and are referred to in proof of the assertions in the text.

dual action. The trial we have now selected owes much of its celebrity to the revival of the bitter feud between the Stewarts and the Campbells, consequent upon the enormities committed by the latter after the battle of Culloden. Colonel Charles Stewart¹, the owner of the forfeited estate of Ard-

¹ We make no apology to our readers for introducing the following anecdote from Beattie's *Caledonia Illustrated* (vol. ii. p. 90.):—"Charles Stewart of Ardsheel, who commanded the Stewarts and M'Colls of Appin in 1745, was previously to that period desperately in love with one of the three daughters of Haldane of Landrick. There being at that time no made road in the Highlands, the shortest and most direct way from Appin to Landrick Castle was by Landgearn and the clachan of Balquhidder. Ardsheel paid several visits to Miss Haldane, but was not successful. In his last and almost despairing visit, he fell in on his way with Rob Roy, who happened to be at his brother's at the clachan of Balquhidder. During the course of their conversation, a quarrel took place, and each being provided with an Andrea Ferrara, they immediately encountered in a kail yard. Ardsheel was the conqueror; and Rob Roy on his way up the glen, was not only heard in the greatest fury exclaiming that 'Ardsheel was the first that ever drew blood of him;' but it is said, moreover, that he threw his broad-sword into Loch Voil, nearly opposite to Stronvarr House, where there is reason to believe it still remains. But Ardsheel not only conquered Rob Roy, he also won the fair lady; for, on the report of the rencontre reaching Landrick Castle, Miss Haldane was so flattered with it that she favoured his addresses. This account of the matter is well known to several of the inhabitants in the parish of Balquhidder; and there is no doubt of its being the correct one." See also "*Memoirs of the Haldanes*," by Alexander Haldane, Esq., Barrister, 1852, p. 6, &c., who confirms the above statement. A somewhat different version is given by Sir Walter Scott in his *Introduction to Rob Roy*; but he says, "that the period when I received the information is now so distant, that it is possible I may be mistaken as to the particular Stewart to whom it properly applies." Ardsheel was among the first to join the Prince. On the 16th of August, 1745, Charles proceeded to erect the Royal Standard, with the celebrated motto "*Tandem triumphans*." "On the next morning," says Lord Mahon, "they began their march, Charles himself proceeding to Lochiel's house of Auchnacarrie, and he was joined by Macdonald of Glencoe with one hundred and fifty men; the Stewarts of Appin under Ardsheel, with two hundred, and Glengarry the younger with about the same.—*Lord Mahon's History of England*, vol. iii. p. 320. The part which Ardsheel took in this unhappy though gallant adventure may be seen in the subsequent portions of this volume. He was one of the five lairds who it appears were then in the Council of the Prince (see memoir in *Hogg's Jacobite Relics*); and even in the fatal battle of Culloden, if all the Highlanders had acted as did the Stewarts of Appin, the result might have been different.—See *Authentic Account of the Occupation of Carlisle in 1745*, p. 225. After the dispersion of the clans and the flight of the Prince, he was among the last to leave the country; but the Act was passed under which, among many others, his estate was forfeited (20 Geo. II. c. 41.); and he escaped to France, where he died many years afterwards, as we have already mentioned. The whole clan of Stewarts of Appin

shiel, led the Stewarts of Appin in the whole of the Rebellion of 1745. The prisoner, James Stewart, was a natural son of Colonel Stewart's father, and, very kindly, managed the affairs of the Colonel's family, who were in distress on account of the forfeiture of their patrimony; and to them, indeed, he acted the part of a father, but was not, as some appear to think¹, ever recognised by the family, under the feudal patronymic of Laird of Ardshiel.² The real Laird of Ardshiel, the Colonel (in the Prince's army), was living, at the time of this trial, in exile, at Sens, where he died in 1757, about five years after the execution of the unfortunate pannel. We may observe that Ardshiel commanded the Stewarts with much distinction at Preston Pans, Falkirk, and Culloden; but only because the Appin branch, now extinct, to whom the honour more properly belonged, was unable to furnish a leader, and Ardshiel represented the next major branch of the clan. (See Hogg's "Jacobite Relicts," vol. ii. *in notis*.) To the title of Laird the pannel, James Stewart, could never have attained, for purity of descent was essential to the enjoyment of such an office.

Any one who knows any thing of the bitter enmity, alluded to above, which existed between the Stewarts and the Camp-

have been recently gratified by the elevation of one of their number to a Vice-Chancellorship — Mr. John Stuart, descended from the Ballachelish branch, and a true son of the clan.

¹ In a work recently published, "Narratives from Criminal Trials in Scotland, by John Hill Burton, Advocate, 1852," giving an account of this trial, the author appears to consider that the James Stewart here tried was Laird of Ardshiel. "After the suppression," he says, "of the last Jacobite insurrection, Colin Campbell of Glenure had been appointed factor for the Government, on certain forfeited estates in the West Highlands, one of which had belonged to Stewart of Ardshiel. In the spring of 1651 he had removed Stewart from the farm of Glenduror," — *C. T.*, vol. i. p. 78. But the James Stewart, the tenant of Glenduror, and the prisoner in the above trial, was not the Laird of Ardshiel, but simply one of his tenants, and the foster-brother of the Laird. Of the Laird himself we have given some account above.

² In his History of Highland Clans, Colonel Stewart of Garth mentions, that for some time after the forfeiture of this estate, the tenants paid *double rent*, once to the Government factor and next to the exiled Laird, vol. i. p. 220., and see 19 St. Tr. 19. The estate was restored to the family at the end of the last century; the present being the seventh Laird, Charles Stewart, Esq., is the great grandson of Colonel Charles Stewart. It is proper to say, that Stewart of Appin, who held the senior fief, never joined the standard of Prince Charles.

bells, in perusing the report of this notorious trial, will not fail to notice that a Stewart was tried for the murder of a Campbell¹ by a Judge who was a Campbell, [the Duke of Argyll, the Lord Justice General,] in the heart of the Campbell territory [Inverary], before a jury of fifteen, a majority of whom could convict, and which majority consisted of Campbells in the proportion of eleven out of the fifteen. The accused had not the power of challenging a single jurymen, without a "cause assigned" (*i. e.*, unless he were notoriously unworthy of credit). And we are ready to say with Mr. Arnot (Coll. Crim. Trials), that the prisoner ought to have had the power of saying, "I, who am a Stewart, will not be tried by a jury of Campbells, for the murder of a Campbell;" or, "I, who am an officer of excise, will not be tried for the murder of a smuggler in a country where all the merchants, farmers, &c. are smugglers." Or, as we may say now more pertinently, "I, who am a loyal subject, and a lover of peace and order, will not be tried for shooting a rioter in a country where all the farmers and petty landowners are Ribandmen." In the case before us, if in any, the Crown ought to have exercised its power of having the pannel tried in Edinburgh, if not in Carlisle, far away from any local influences; a power, be it observed, not possessed by the pannel.² Nor is this trial without its bearing, as we have suggested, on passing events and present occurrences in Ireland; the distinction being that in Scotland, in this instance, there was an over-anxiety to convict, whereas in Ireland there is often an improper eagerness

¹ P. 12.

² Sir Walter Scott in *Rob Roy* (edit. 1841, p. 48.), in relating the story of this murder, says: "A gentleman named James Stewart, a natural brother of Ardsheel, the forfeited person, was tried as being accessory to the murder, and condemned and executed upon very doubtful evidence, the heaviest part of which only amounted to the accused person having assisted a nephew of his own, called Allan Breck Stewart, with money to escape after the deed was done:" which he calls a "vengeance which was obtained in a manner little to the honour of the dispensation of Justice at the time." We may observe, that the reader of *Waverley* will find that this trial gave Sir Walter Scott not a few of his names of men and places, and suggested to his mind some of the incidents of that delightful fiction. We should also say, that this murder has been made the foundation of a separate novel, called *Allan Breck*, by the Rev. G. R. Gleig.

to acquit. In either case the removal of the subject-matter to an impartial tribunal would be justified.

Against the jury, as individuals, we say nothing; neither would we press hard on them. It was, perhaps, no fault of theirs that they were so constitutionally prejudiced against the pannel as to have arrived at a foregone conclusion of his guilt; that they were, in consequence, so blind that a few commonplace circumstances, of every-day occurrence, so ably strung together and connected by the prosecuting counsel as to appear, at first sight, inconsistent with the innocence of the pannel, gained their too ready acquiescence. Circumstances, some of which, to our mind, convey the very opposite impression, and others which were satisfactorily explained or rebutted by credible witnesses on the part of the pannel, or by his advocates; to whose able speeches the jury seem to have shut their ears.

But as justice is neither to respect the person of the poor nor honour the person of the mighty, we cannot pass over the extraordinary conduct of the Chief Judge, who betrayed a strong prejudice against the pannel on several occasions¹, if the author of the "*Supplement to the Trial*"² be worthy of credit, and we are not aware that his statements have been controverted; and the same bias was shown in delivering judgment. Thus we are at a loss to conceive on what possible ground of Law or of Equity the Court could be justified, in a Criminal case, in refusing to admit evidence to the character of the pannel.³ Such evidence, in a case depending wholly on circumstantial evidence, seems to us to carry peculiar weight with it, and its rejection, therefore, to have been both harsh and unjust to the pannel. Is the evidence of a man's wife and children to be admitted against him; are his papers and letters to be ransacked for malicious expressions; his actions and motives misconstrued; and his words tortured, and twisted, and screwed into something that might tell against him; and are witnesses to be bribed?⁴ And is no

¹ Pp. 12. 32. 116.

² From the notes to the Trial.

³ See Phillips and Arnold on Evidence, p. 502. Taylor on Ev.

⁴ One of the witnesses, John Breck Maccombich, deponed, that in the begin

one to be allowed to say a good word for him,— not even his landlord? And this, too, after he had been subjected to an unjustly rigorous imprisonment, during which all access to him was debarred, even so as to allow his advocates but little time to prepare his defence. (See 19 St. Tr. pp. 106. and 116.) It is necessary to give one proof of this statement:—

“Mr. Miller, one of the pannel’s lawyers, desired that the deponing witness (Mr. Campbell of Airds) might be interrogated as to the pannel’s moral character in the country; and particularly, whether or not he was a God-fearing man, and generally employed in taking care of the affairs of widows and orphans. The Lord Justice-General was pleased to oppose the interrogatory, saying words to this purpose, ‘Would you pretend¹, Sir, to prove the moral character of the pannel, *after being guilty of rebellion*, a crime that comprehends almost all other crimes? Here you will find treasons, murders, rapines, oppressions, perjuries, &c.’ Mr. Miller answered, that ‘the King had been pleased to grant an indemnity, in which the pannel was included: and, therefore, he could legally interrogate the witnesses as to the pannel’s moral character.’ But the clerks were forbidden to take down anything said by the witnesses relating to the goodness of the pannel’s moral character.”

But it is to the clan system itself that much of this evil is due; and while we look back with admiration on the heroic deeds and brilliant gatherings of the clans, let us not be blind to the feuds and raids, the rapine and ill-feeling, the black mail and cattle-rieving, which also belonged to the system. We shall not then mischievously strive, as some, perhaps, would have us do, to reproduce the mere outside accidents of the past, instead of perfecting our own present; but shall feel thankful that, whatever may have been the case at one time, the union of clans is no longer a necessary precaution; that

ning of the summer, Duncan Campbell, sheriff substitute of Killin, told the deponent that if he would *with truth and honesty* make any discovery tending to discover the murderers of Glenure, *it was probable he would not be turned out of his possession*.—St. Tr. p. 106.

¹ On hearing this the pannel observed to his agent, “It is all over now: my lawyers need give themselves no further trouble about me: my doom is as certain as if it were pronounced. I always dreaded this place and the influence that prevails in it; but this outdoes all. God forgive him.”—P. 117. n. from Sup.

the Campbells and the Stewarts are no longer in deadly feud, but can respect and regard each other; that society now stands on a broader and, we thank God, on a securer basis, and one which bids fair, we would fain hope, under some present discouragement, to spread through the length and breadth of the earth.

We shall now introduce to our readers the principal actors in this remarkable tragedy. They are —

James Stewart, in Aucharn in Duror of Appin.

Allan Breck Stewart.

Colin Campbell of Glenure, the victim.

The Lord Justice-General, the Duke of Argyll.

Two Lords Commissioners, Lords Elchies and Kilkerran.

The Assize or Jury of 15 persons.

The prisoner, James Stewart, was tried at Inverary.

The Procurators for the prosecutors were, the Right Honourable William Grant, of Preston Grange, Esq., His Majesty's Advocate; Mr. James Erskine, Advocate, Sheriff depute of Perthshire; Mr. John Campbell, younger, of Levenside, Advocate; Mr. Robert Campbell, of Asnich, Advocate; Simon Frazer, Esq., Advocate.

Procurators for the pannel, Mr. George Brown, of Colstoun, Advocate, Sheriff depute of Forfarshire; Mr. Thomas Miller, Advocate, Sheriff depute of the Stewartry of Kirkcudbright; Mr. Walter Stewart, younger, of Stewarshall, Advocate; Mr. Robert Mackintosh, Advocate.

Colin Campbell of Glenure was appointed, on the 23rd of Feb. 1748-49, factor of the forfeited estates of Ardshiel by the Barons of the Exchequer in Scotland, and also of Mamore, part of the forfeited estate of Lochiel, as well as of that of Allan Cameron, lying between Appin and Fort William. Some time before Whitsunday, 1751, the factor applied to James Stewart, the pannel, to yield up the Glenduror farm, of which he was then in possession, to Campbell of Balievelan, a particular friend of the factor's, who offered more rent. This Stewart did without waiting for a warning, and without discovering the slightest ill-feeling on the subject, and took the farm of Aucharn from Mr. Campbell, of Airds, continuing, as before, to uplift the rents of Ardshiel.

In April, 1752, the factor executed a warning against the

subtenant of Lettermore, and against some of the Ardshiel tenants to remove at Whitsunday, 1752. The pannel expostulated with the factor, telling him it was hard to turn them out, since they "offered to give more additional rent than any others would, and would take the oaths to Government"¹; but the factor, acting under orders, persisted, and the pannel, being in Edinburgh, obtained a sist (equivalent to an injunction in Chancery); but he failed to maintain it, or, as we should say, the injunction was dissolved; and the factor was proceeding, in due course of law, accompanied by an officer, to eject the tenants at the time for which he had given them warning. He had proceeded some distance on his way, had crossed the ferry of Ballachelish, and had entered a narrow defile at the wood of Lettermore, when an assassin shot him dead from behind in the manner described by a witness for the prosecution, whose evidence we shall presently give at length. The libel, or indictment, begins as follows:—

"George, by the grace of God, king of Great Britain, France, and Ireland, defender of the Faith. To our lovits, macers of our Court of Justiciary, messengers-at-arms, our sheriffs in that part, conjunctly and severally, specially constitute, greeting." And proceeds to charge James Stewart and Allan Breck Stewart, complained upon, as "guilty, actors, or art and part of the said heinous crime of murder."

It consists of three syllogistic propositions. The major states the crime, its nature, and its punishment; the minor avers the pannel's guilt of the crime from a narrative of facts, which must sufficiently inform the pannel at the Bar of that which is laid to his charge; and the conclusion infers that, on conviction by the verdict of an assize, he ought to suffer the penalty by law attached to his offence.—(See Hume's *Comm. Laws of Scotland*, Art. "Libel," by B. R. Bell, 3rd ed.)

The libel charged Allan Breck Stewart as the actual murderer, and James Stewart the pannel, as being art and part, or an accomplice (*cujus ope et concilio*, in the Roman law). Sir George Mackenzie explains the expression "art and

¹ P. 100.

part" as relating to a contriver of the crime *cujus arte*, and to a participator, *quorum pars magna fui*; some derive the phrase from "*articeps et particeps*."

The trial began with long pleadings as to the relevancy of the libel: the only point worth noticing, is the objection that the pannel, charged as accessory, could not be tried before the principal: on this point Hume¹ (*supra*, vol. i. p. 283.) observes, "With us the principal actor and the accessory, in whatever way he is so, may be called in one libel, and put to the Bar together. Or, if the actor has fled, the accessory may be tried on the same libel, after sentence of fugitation passed on it against the actor. Nay; the trial may proceed without sentence of fugitation even against the actor." The Court pronounced the libel valid.

We agree with Mr. Arnot (Crim. Trials, p. 193.) in thinking these pleadings extremely ill-judged on the part of the Advocates for the prisoner, as they afforded an opportunity to the prosecuting Counsel to prejudice the jury by dressing up a tale of guilt, and artificially arranging circumstances tending to criminate the prisoner.

"The libel charges the pannel with entertaining resentment against the factor on account of his own removal, and of the proposed eviction of the members of his family, as we have already related above; and, therefore, procuring the sist at Edinburgh. That on account of these and other proceedings of the factor in the faithful discharge of his duty, James Stewart, and Allan Breck Stewart, conceived a most groundless and unjust resentment, malice, and enmity against him, and at length entered into a wicked conspiracy, barbarously to murder the said Colin Campbell, and to bereave him of his life by the hands of the said Allan Breck Stewart.' That in prosecution of this wicked conspiracy, Allan Breck on the 11th of May, went to the pannel's house, where he slept, and informed him that the factor would return and evict the tenants before the 15th; changed his French dress, for one of the pannel's which he wore, leaving the other behind him; and took with him next morning, or procured to have sent to him, one or more gun or guns; that he stayed in the neighbourhood in the interval, and having found out when the factor was to return, posted himself in the wood of Lettermore, from

¹ Commentary on Laws of Scotland, vol. i. p. 283.

whence he shot him. Whereupon Allan Breck absconded: the pannel, James Stewart, stayed at his house and sent for money to send to Allan Breck; and sent some to him, with his French dress, to Coalisnacoan, where he lay concealed until provided with resources for returning to France."

We will now give the history of the murder itself as given in evidence:—

"Mungo Campbell, writer in Edinburgh, depones, that in the beginning of May last, the deceased, Colin Campbell of Glenure, applied to the deponent to go with him to Lochaber, to assist him in conducting the ejection of some of the tenants on the estate of Stewart of Ardshiel, and of the tenants of Mamore, part of the estate of Lochiel, over which the said Colin Campbell was factor, and which tenants he apprehended would not voluntarily remove without being legally ejected; that they set out from Edinburgh together upon the 7th of May last, and arrived at Glenure upon Saturday the 9th of that month: that they set out together for Fort-William upon Monday the 11th, about ten o'clock forenoon, and remained at Fort-William till Thursday the 14th, when they returned in order to execute the next day the ejection against some of the tenants of Ardshiel. That when they came to the Ferry of Ballachelish, the defunct waited there about an hour, communing with some of the tenants, and crossed the ferry betwixt four and five in the afternoon: that after crossing the ferry, Alexander Stewart of Ballachelish, elder, met with the defunct, and they travelled together on foot about the space of half a mile, till they came to the skirts of the wood of Lettermore; that while they were communing together on foot, the deponent was at some little distance before them on horseback; and the Sheriff-officer, Donald Kennedy, was on foot before the deponent and Glenure's servant. John Mackenzie was on horseback a little before Glenure, and the servant happening to drop a coat, Ballachelish called to him, and the servant returned and thereby fell behind Glenure and Ballachelish: that Ballachelish parted from Glenure at their entering into the wood of Lettermore, or the wood of Ballachelish, a part of the wood being called by that name; and Glenure mounted his horse and came up to the deponent; that the deponent asked Glenure whether Ballachelish had said anything to him touching removing the tenants? And Glenure said, that nothing passed betwixt them on that subject. That coming to a part of the road that was rough and narrow so as they could not ride conveniently two horses a-breast, the deponent and Glenure separated, and the

deponent went before and might have been about twice the length of the room where the Court now sits before Glenure, when the deponent heard a shot behind him, and heard Glenure several times repeat these words, 'Oh! I am dead.' Depones, that the deponent thereupon returned to Glenure, and heard him repeat the same words; and thinks, but is not positive, that he added, 'take care of yourself, for he's going to shoot you:' that the deponent immediately lighted, and run up the hill from the road to see who had shot Glenure, and saw at some distance from him, *a man, with a short dark-coloured coat, and a gun in his hand*, going away from him; and as the deponent came nearer him, he mended his pace, and disappeared by high ground interjected betwixt him and the deponent; and he was at so great distance, that the deponent thinks he could not have known him, though he had seen his face; that the deponent thereupon returned to Glenure; and either at that time, or before the deponent run up the hill as above deponed, (the deponent cannot be positive which) he took Glenure from off his horse; depones that after taking Glenure from his horse, he leaned a little upon the deponent's shoulder, and endeavoured to have opened his breast to see where the bullets where-with he was shot came out of his body, but was not able; but saw in his waistcoat two holes in his belly where the bullets had come out. Depones, that Glenure intended to have been that night at Kintalline, where he expected Mr. Campbell of Ballieveolan was to meet him: wherefore, the deponent sent Mackenzie, the servant above mentioned, forward to Kintalline to acquaint Ballieveolan what had happened, and to bring him to his assistance: that Glenure continued in agonies for about half an hour, or a little more, after sending off Mackenzie, and then died: and night coming on, and no appearance of Mackenzie's returning, the deponent sent back the sheriff-officer above-named to Ballachelish, to desire Mr. Stewart's assistance and some of his people; that in a little more than an hour, Ballachelish and some of his people, with the sheriff-officer came to the deponent's assistance, and carried Glenure's corpse that night to Kintalline by sea, and next day carried it to Glenure, where some surgeons came and inspected his body; and the deponent saw there the two wounds in his belly made by the balls coming out of his body. Depones, that when the deponent laid Glenure upon the ground, a great deal of blood issued from his body, and his clothes were all stained with blood, particularly the small of his back, having been laid on his back upon the ground: that Mackenzie the servant also returned before they

carried the corpse off the ground, and some people with him, particularly Ballievolan's sons: and being shown a coat, and waistcoat, and a shirt, depones that these are the coat and vest that Glenure had on when he was murdered; and believes also, it is the same shirt. Depones, that at the place where Glenure was shot, the wood is pretty thick on both sides, and on the side from which he was shot, very rugged and stony, and bushes in which the murderer might have easily hid and concealed himself: that the ground there rises up-hill towards the south, though there are places in it where the murderer might be pretty nearly upon a level with Glenure; and there are also places there so situate, as a person standing there might see the most part of the road from the ferry to the wood, and even a part of the road betwixt Fort-William and the ferry, and which place is not a musket-shot from the place where Glenure was murdered. Depones, that neither the defunct nor the deponent, nor any of their company had any sort of arms with them. Depones, that it was betwixt 5 and 6 o'clock in the afternoon, as he thinks, when Glenure was murdered as aforesaid: and remembers when Glenure was dying, the deponent looked at his own watch, and found it was then about 6 o'clock. And depones, that upon recollection, he cannot be positive whether he observed both the wounds in the defunct's belly, or only one of them. And being interrogate for the pannel, depones, that some days after the murder *the deponent sent a serjeant and a party of soldiers to the pannel's house at Aucharn, with orders to search, and particularly to search for writings: that the serjeant reported to the deponent that he had searched, and delivered to the deponent one paper which he found there, being a scroll of a letter by the pannel, and of an instrument of protest, being the number 12 of the inventory subjoined to the libel, and which is now in the clerk's hands; and being shown to the deponent, depones, that it is the same writing that was delivered to him by the serjeant. Depones, that the serjeant gave him no more papers but that one, and said, that he had brought away no more."*

There is now little doubt that Allan Breck Stewart¹ was

¹ "Allan Breck," says Sir W. Scott, "lived till the beginning of the French Revolution. About 1789, a friend of mine then residing at Paris, was invited to see some procession which was supposed likely to interest him, from the windows of an apartment occupied by a Scottish Benedictine priest. He found sitting by the fire, a tall, thin, raw-boned, grim-looking old man, with the *petit croix* of St. Louis. His visage was strongly marked by the irregular projections of the cheek-bones and chin. His eyes were gray. His grizzled hair exhibited

the man described by the witness as "a man with a short dark coloured coat, and a gun in his hand," and was the perpetrator and sole originator of the murder. He was an outlaw; and had, it appears, entered the service of the French King after the battle of Preston-pans; he had been, from early years, brought up by the pannel; to whom, with Colonel Stewart of Ardshiel, Allan Breck Stewart's father had entrusted the care of his children, and the management of his affairs.¹ And whenever Allan Breck came over from France his home was the pannel's house: and there he seems, at least once before the murder, to have changed his French dress, described by one witness (Duncan Stewart of Glenbuckie²) as "a long blue coat, red waistcoat, black breeches, and a feathered hat;" for one belonging to the pannel or one of his sons. He was connected with the Ardshiel family, with whose interests he identified himself. He entertained a bitter hatred of the factor, on more accounts than one; this is proved by the evidence for the prosecution; and we shall give the more weight to it when we remember, that the Advocates for the prosecution laid it down, that Allan Breck was the mere instrument, while the malice and the planning of the whole murder was the part of the pannel.

"Angus Macdonald, walk-miller in Auchosragan, depones, that in April last, Allan Breck Stewart, and John Stewart in Auchnacoon, came into the deponent's house and sat down; and at the same time Duncan Campbell (the succeeding witness) came in and sat down also; and which Allan asked John Stewart, who that

marks of having been red, and his complexion was weather-beaten and remarkably freckled. Some civilities in French passed between the old man and my friend, in the course of which they talked of the streets and squares of Paris, till at length the old soldier, for such he seemed and such he was, said with a sigh, in a sharp Highland accent, "Deil ane o' them a' is worth the Hie Street in Edinburgh!" On inquiry, this admirer of Auld Reekie, which he was never to see again, proved to be Allan Breck Stewart. He lived decently on his little pension, and had in no subsequent period of his life shown anything of the savage mood in which he is generally believed to have assassinated the enemy and oppressor as he supposed him of his family and clan." — *Introduction to Rob Roy*. An ineffectual attempt to trepan Allan Breck, and deliver him to justice, was made by James Mohr Drummond, one of the sons of Rob Roy.

¹ P. 153.

² P. 150.

was? and John answered, that he was an honest man in the neighbourhood, 'Duncan Campbell,' naming him; to which Allan answered, that he did not like any of the sort or name; for that Glenure had wrote to Colonel Crawford that he had come from France, and to take him up as a deserter; but that he was not in his reverence, for he had General Churchill's pass; that John Stewart said, that he did not so much blame Glenure for turning out the possessors of Ardshiel: for that he was but doing the King's service; and, that if he had not the factory, another would, who would do the same thing; to which Allan answered, 'that he rather the meikle devil had it than Glenure.'

"The next witness, Duncan Campbell, change keeper, (*i.e.* publican) at Annat, confirms in every respect the evidence of the last; adding, that after the conversation mentioned by the last witness, the party went into his (deponent's) house (after a dram at an intermediate house) where after, some drams, Allan Breck said, 'that if deponent had any respect for his friends he would tell them that if they offered to turn out the possessors of Ardshiel estate *he would make black cocks of them* before they entered into possession, by which deponent understood shooting them; it being a common phrase in the country.' Allan Breck then mentioned, 'that he had another ground of quarrel against Glenure, for his writing to Colonel Crawford, that he, Allan, was come home from France.' And depones, 'that he (Allan) said twenty times over he would be fit sides (*i.e.* even) with Glenure.'

"Anne Maclaren, servant to the last witness, remembered Allan Breck Stewart, John Breck Stewart, and Robert Stewart being together in her master's house, and heard Allan Breck Stewart then say, that he 'would not shun Glenure (the factor) wherever he met him;' by which she understood that he was to do hurt or harm to Glenure wherever he saw him."

To the same effect is the evidence of the next witness, Robert Stewart:—

"The next witness, Malcolm Bane Maccoll, deponed, that Allan Breck gave him a stone of meal, and then a dram, saying, that if he would fetch him the red fox's skin, he would give him what was much better. Depones, 'that he took no great notice of these expressions at the time; but after he heard of Glenure's murder, believed he meant Glenure, as he was commonly called Colin Roy, which means Red Colin in the country.'"

The malice entertained by Allan Breck on his own ac-

count, as well as from family feeling, against Colin Campbell, clearly appears from the evidence above given. It is certain that Allan Breck (whether rightly or not we are not concerned to inquire) thought that Colin Campbell had told Colonel Crawford that he was in the neighbourhood. It is not part of our purpose to prove the guilt of Allan Breck; of this our readers may decide for themselves. Certainly facts do not seem to favour his innocence. He was known to have borne, and was heard to express, deadly hatred against the murdered man; he was observed, on the morning of the day on which the murder was committed, near the spot; he is proved to have inquired which road the murdered man would take; he wore, on the morning of the day, a dress like that worn by the man who was seen escaping immediately after the fatal shot was fired. He betrayed, after the murder, indubitable signs of fear and guilt, as we think. Dread indeed of being captured as a deserter by the military, who would be on the look-out for the murderer, may have been some cause of alarm to him, although he knew the country perfectly; but this will not account for his mistrust of his closest relations, for which they had given no cause; knowing too, as Allan Breck did, the characteristic fidelity of the highlanders, — we cannot but think that he was afraid of himself. Two witnesses separately charged him with the murder, — several suspected him.

We now purpose to select out of the evidence all that bears most strongly against the pannel, James Stewart. We have already shown that his dislike of the factor was not great, and assuredly did not amount to malice, and could not account for the formation of so barbarous a plot by any sane man, still less by one so kind, and possessed of so much common sense as the pannel. He knew, too, very well, that Colin Campbell the factor was only obeying his orders from the Barons of the Exchequer, and that his successor must do the same: and we may safely say, that it was not the man, but the factor, who was disliked by the pannel. It will appear from the evidence that "dislike" is quite strong enough to express the feeling of the pannel towards this poor Colin Roy; which appears from a few loose expressions, the force

of which depends greatly on the manner in which they were reported, and which, in the mouth of an honest man, mean nothing ; which words, be it remembered, the witnesses were bribed to remember and tempted to exaggerate. Something more than the ordinary intercourse between relations, the loan of a coat, and a bed in a barn, is requisite to prove a conspiracy : against it are, the fact that the pannel, on receiving an urgent request from Allan Breck after the murder for money, had none ready to send to him, and that proved by Donald Stewart (p. 108.), that on hearing Allan Breck's request for money, the pannel asked why "Allan Breck did himself not come for money?" to which deponent replied, that "Allan told him he would be suspected for the murder, and was a deserter;" to which the pannel answered, "that he hoped in God, Allan Breck was not guilty of the murder." Donald Stewart told the pannel to send the money to Koalinsnacoan ; and if he had not done so, the pannel, of course, knew Allan Breck's haunts pretty well : these facts seem to admit of the reverse interpretation. Mr. Arnot has observed upon the evidence so well, that we shall adopt his remarks ; adducing first some portions of the very voluminous evidence in support of our assertions.

"Archibald Cameron said, that upon Monday, the 11th day of May last, the deponent came from Fasnacloich's house to the pannel's house, after mid-day ; that some little time after he came there, he saw Allan Breck Stewart there ; that the pannel was not at home when the deponent came first there, but came home before nightfall ; that the deponent, pannel, Allan Breck, and the family, sat in one room, and supped together ; that he did not observe Allan Breck and the pannel speak in private that night ; that the deponent and Allan Stewart, the pannel's son, lay in one bed, Allan Breck and Charles Stewart, son to the pannel, in another bed, in the same barn ; that, to the best of his remembrance, they all went to bed much about one time, and got up together next morning ; that the deponent did not observe the pannel about the house next morning when he got up.

"Allan Oig Cameron, in Arlarich, in Rannock, deposes : that on Monday, he thinks the 18th of May last, Allan Breck Stewart, the deponent's nephew, came to the deponent's house, in Rannock, who, having told the deponent he had come from Appin or

Glenco, the deponent, who by that time had heard a rumour of Glenure's murder, said to the said Allan, that he doubted not he might be suspected of it, as he was a loose idle man in the country; to which the said Allan answered that he made no doubt himself that he would be suspected of it; and the deponent having pressed him earnestly to make a clean breast, and tell him all he knew of the matter, he declared, with an oath, he had never seen Glenure, dead or alive; and the said Allan having stayed with the deponent till the Wednesday thereafter, the deponent frequently repeated his instances, to tell him what he knew of the murder; at which Allan Breck became angry, and the deponent desisted further inquiry. That the said Allan Breck left the deponent's house upon the Wednesday, whom the deponent conveyed little more than two gun-shots from his own house; but Duncan Stewart, chapman, the preceding witness, who had come to the deponent's house that morning, went along with them, and he saw them take a little bye road through corn, which might have led them to the high road; but what road they afterwards took he does not know; and depones, that at this time Allan Breck Stewart was dressed in a big coat of a brownish colour, and had under it a long blue coat, lined with red, red waistcoat, and a bonnet; that upon the 24th of May, as the deponent thinks, having occasion to go to his master, Sir Robert Menzies, when about fourteen miles from his own house, and at the side of a wood, he heard a whistle from the wood, and, looking about, saw it to be the said Allan Breck, and the conversation he then had with him was to the following purpose:—That Allan Breck having told him his only fear was to be apprehended by the military, which might prove very fatal to him, as he had been a deserter, which led the deponent to say that he was very sure the friends of the deceased would procure him his discharge, if he could discover the murderer; to which Breck answered that they were at this time in such fury and rage, he was very sure, were he apprehended, he would be hanged.

“ John Beg Maccoll, a very doubtful witness, deposed that on the 15th, the day after the murder, he assisted in hiding the two guns belonging to the pannel, and all the arms about the house, as a party of soldiers was coming (p. 134.), and that he saw Allan Breck's clothes hidden by Catherine Maccoll. To John Breck Maccoll, who told him the pannel was taken, Allan Breck expressed a fear ‘lest Allan Stewart, son to the pannel, might be betrayed by his own tongue.’ (P. 146.)

“ Archibald Macinnes, ferryman at Ballachelish, depones that

he met Allan Breck Stewart near the ferry of Ballachelish upon the evening of Wednesday, the 13th of May last, as the said Allan returned from Glenco. Depones, that after mid-day, upon Thursday, the 14th day of May last, as the deponent was sitting near the ferry of Ballachelish, with the son of John Campbell, in Stronmellachan, in Glenorchie, Allan Breck came behind them, and hoasted (*i. e.* coughed); and, upon the deponent's looking about, desired him to come to him, which the deponent did; and the said Allan inquired of him, if Glenure had crossed the ferry from Lochaber to Appin? The deponent told him he was sure he did not: that upon this Allan Breck went away towards the high road; had on a dun-coloured big coat, and had no fishing-rod; and the deponent has not seen him since. Depones, that he is ferryer upon the Appinside, where this conversation happened.

"John Stewart, younger, of Ballachelish, depones that the day after the murder of Glenure, the deponent was at the pannel's house, who, after 12 o'clock of the day, told the deponent, that he had had a message that morning from Allan Breck by Donald Stewart, to send him money; but does not remember whether the pannel told him the place where he was directed to send him: and the pannel told the deponent that he was resolved to send him money. Depones that the last day of December last the deponent was in company with the deceased Glenure, an uncle of Ardshiel's, and the pannel, and Mr. Campbell, of Ballieveolan: when, after the company had drunk very hard and were all drunk, some high words arose between Glenure and Ardshiel's uncle, and they were like to come to blows, which both of them attempted; but the deponent once and again separated them: that Ardshiel's uncle happened to go out of the house, as did also the pannel; and the deponent called to the people without not to let them in again, because they were drunk: that *the pannel had invited Glenure next day to his house*, which Glenure had accepted of; and therefore the pannel pressed him to come in again to the house to renew the invitation, and take his leave of Glenure; but the deponent would not allow him to come in, and undertook to make his excuse to Glenure: that the deponent coming into the house, found Glenure standing with a drawn hanger in his hand; and the deponent asked what he meant by that; and Glenure answered that he should not allow him to be mobbed there, upon which the deponent assured him he should not be mobbed there: and then Glenure threw the hanger upon the bed: that the deponent went home with the pannel; *and next day Glenure came there before*

dinner and dined ; and made apologies mutually for what passed the night before ; and that Mr. Campbell, of Ballieveolan, dined there also. And being interrogate for the pursuers, depones, that the deponent was in Edinburgh in August last, and was present at consultations of the pannel, his lawyers, and agents, touching *his defence*.

“ Alexander Stewart, travelling packman, in Appin, depones, that upon Friday, the 15th day of May last, about 12 o'clock, the pannel desired the deponent to go to Fort William, to William Stewart, merchant there, and get from him five pounds or five guineas ; and told the deponent that his friend Allan Breck was about to leave the country, as there were troops coming into it, and that he might be suspected of Glenure's murder ; and that it was incumbent upon him, the pannel, to supply the said Allan Breck money : and the pannel desired the deponent to tell the said William Stewart that he must send him money, though he should borrow it from twenty purses ; and desired him also to tell the said William to give credit in five pounds sterling to John Breck Maccoll, bouman to Appin, at Koalisnacoan, in case he came to demand such a sum ; and the pannel desired the deponent to demand four pounds sterling more from the said William, as the price of a couple of milk-cows bought for him. Depones that, in consequence of the above message, he went to Fort William, where he arrived early in the evening : that he met the said William Stewart, and demanded from him, for the use of the pannel, the two sums above mentioned : that the said William told him he had not money, but desired the deponent to go to Glenevis ; and he the said William had business to Glenevis, would meet the deponent there in the morning, and give him his errand. Depones, that the pannel desired the deponent to tell the said William Stewart to send notice to Glenevis that he should send for a stoned horse Glenevis had bought from the pannel.”

This is the most serious evidence as to the prisoner being art and part in the crime ; but it may, we think, be fairly explained by the strong feeling of friendship which then prevailed, and the kindly disposition of the prisoner to the whole race of Ardshiel. We need hardly call attention to the fine trait in the character of the prisoner, who, when himself arrested, and apparently pressed for money, still borrowed and gave up all to make up a sum to assist one who appeared in greater need even than himself. *Colin Roy had also tasted the pannel's salt.*

The witness continued:—

“Depones, that he went to Glenevis, where he arrived about sunset, and stayed there the said Friday’s night: that, as the said William did not come there, Saturday morning, the 16th day of May last, the deponent went back to Fort William, and met the said William Stewart upon the street, and asked him if his answer was ready? That the said William said, that he would let him go immediately, and went into his own house, and immediately thereafter Mrs. Stewart, spouse to the said William, came to the door, and gave the deponent three guineas, with which the deponent went back immediately to Aucharn, and arrived there in the evening of the said Saturday, the 16th of May: that when he came to Aucharn, the pannel was not at home: but soon after the deponent’s arrival, notice came that the pannel and Allan Stewart his son were made prisoners at Inshaig, a place of about a quarter of a mile from Aucharn: that immediately upon this notice, Mrs. Stewart, the pannel’s wife, and the deponent, went to Inshaig; and by the way the deponent offered the three guineas he had brought from Fort William to Mrs. Stewart, but she desired him to keep them: that, upon their arrival at Inshaig, they found the pannel a prisoner; but Mrs. Stewart and the deponent having had access to converse with the pannel apart, the pannel asked the deponent what money he brought from Fort William? And upon the deponent’s telling him that he brought three guineas, the pannel pulled a green purse out of his pocket, out of which he took two guineas, and gave them to Mrs. Stewart, and Mrs. Stewart delivered the two guineas immediately to the deponent; and the pannel desired, *that the five guineas should be sent to that unhappy man, meaning Allan Breck, to see if he could make his escape*; and pitched upon the deponent as a person that should go with the money; and does not remember positively that the pannel spoke about Allan Breck’s clothes: that soon thereafter the pannel was carried off by a party to Fort William, and the deponent returned to Aucharn with the pannel’s wife: *that the party and pannel called at Aucharn and took a dram*: [this eternal dram-drinking occurs through the whole of the evidence] and upon their going off, Mrs. Stewart, the pannel’s wife, told the deponent that he must go to Allan Breck with the five guineas and his clothes. And upon the deponent’s inquiring where he would find him? Mrs. Stewart told him that he would cast up in Koalisnacoan. Depones, that some time after night-fall the deponent got his supper at Aucharn, and how soon he was done eating, Mrs. Stewart, the pannel’s wife, carried the deponent to the back of the

brewhouse, where there lay a sack, out of which the said Mrs. Stewart took a blue side coat, red waistcoat, black breeches, a hat, and some shirts — all which she delivered to the deponent, ordering him to go with the clothes and money to Koalinsnacoan immediately, and deliver them to John Breck Maccoll, bouman to Appin, if he did not meet Allan himself. Depones, that the said Mrs. Stewart directed the deponent not to carry the clothes to John Breck Maccoll's house, lest anybody might see them. Depones, that he declined going, and told Mrs. Stewart that she might send some other person, and that, at any rate, *he did not choose to go alone in the night time*, but that Mrs. Stewart insisted upon his going, telling him there was no other body she could send, as both her servants were gone to Fort William, *and desired the deponent to carry his sister, Margaret Stewart, a part of the way with him; that accordingly the said Margaret, his sister, went along with the deponent as far as Larich, in Glenco, where she parted with him about day-light Sunday morning*: [the women were thus shown to be of sterner stuff than the men] that thereafter the deponent travelled alone to Koalinsnacoan, and left the clothes, as directed, at the root of a fir-tree, at some distance from the houses; and as the deponent was going to the house, he met the said John Breck Maccoll, and asked him if Allan Breck was there? And upon his denying that he was there, the deponent expressed some surprise, and told that he was sent with money and clothes to him: told from whence he came, and how he got the money and clothes above mentioned; upon which the said John Breck Maccoll told the deponent that Allan Breck was in the heugh of Corrynakeigh, above the house of Koalinsnacoan; and if the deponent inclined to see, the said John Breck Maccoll directed him to go to a hill above the houses and whistle, and that the said Allan Breck would come to him: that the deponent answered, he had gone far enough after the said Allan Breck already, pointed out to John Breck where he had left the clothes, and gave him the five guineas to be given Allan Breck. Depones, that he went to the said John Breck's house, where he slept for some time, and thereafter dined with the said John Breck at his house. Depones that the said John Breck Maccoll told the deponent he did not know how the said Allan Breck could leave the country, as he had no victuals; and he, the said John, had none to give him, and desired the deponent to go to Mrs. Macdonald, of Glenco's house, at Inver, and get a peck of meal for Allan Breck's use, which the deponent refused. Depones, that the said John Breck Maccoll told the deponent that unless he had come

with the money and clothes, he the said John Breck would have been obliged to go to Fort William for money to the said Allan Breck. Depones that he the deponent came back to Aucharn upon the evening of the Sunday, the 17th day of May last, and the pannel's wife asked him if he had seen Allan Breck? And upon his answering he had not, and telling that Allan Breck was at Koalishnacoon, though he had not seen him, and that he had given the clothes and money to John Breck, she appeared satisfied. Depones that the said John Breck Maccoll desired the deponent to conceal his carrying the clothes and money to Koalishnacoon, as above; told him that he could not prove it against him, and that he could safely depone he did not deliver the clothes to him, since he only pointed out where they were."

We shall now give Mr. Arnott's remarks on the evidence:—

' The guilt charged against the pannel is, that he was accessory to, and art and part in, conspiring the murder of Glenure, which was perpetrated by Allan Breck Stewart.

" The circumstances from which the prosecutors inferred the prisoner's accession to this murder, may perhaps be fit enough to excite a suspicion of guilt in the speculations of the closet, but I apprehend them to be in the highest degree improper and dangerous to be produced as evidence to affect the life or fortune of a prisoner in the tribunal of justice. The circumstances were shortly these;—that Allan Breck, a kinsman of the prisoner, paid him a visit three days preceding the murder, sat with him and other company at supper, and slept in a barn; that Allan Breck put off his French clothes, dressed himself in a short coat belonging to the prisoner, or his son, ere he went to work in a field of potatoes; and next morning, when he left the house, went off in the short clothes, and left his own, which, by the by, he had done upon former occasions; that the prisoner, upon the search which was to be made for the murderer of Glenure, supplied with money, for the purpose of making an escape, his kinsman, Allan Breck, a fugitive, and a deserter; that the guns about the prisoner's house were hid, in a country where it was a crime to be possessed of arms; that the prisoner had used repeated expressions of resentment and of vengeance against Glenure; and that, after the murder, Allan Breck expressed his apprehension, lest the prisoner, or his son, should be betrayed by their own tongue. These are the amount of the evidence against the prisoner, which resulted from a

scrutiny, by no means warrantable, into his life and conduct. The rigorous durance in which he himself was confined, and his son and servants being kept close prisoners in separate apartments, have been already mentioned. His repositories were thrice searched by the prosecutors' relations without legal warrant, and attended by a military force; and every circumstance of his life and conversation, for a period of two years, was raked into with the most invidious industry. But this last mode of extracting evidence, and the result which flowed from it, require to be particularly considered.

"Where there is no positive evidence, demonstrating the author of a mischief, which an individual has sustained, menacing expressions may be justly admitted, along with other circumstances, as a link of the chain of circumstantial evidence against a prisoner. But, to lay much stress upon general expressions of resentment, and even of vengeance, such as, 'I wish he were hanged;' 'he is unworthy to live;' 'I will cause him to repent it,' or the like, would lead to a conclusion equally false and fatal. In social intercourse, the energy of our expressions of applause or of censure, of gratitude or of resentment, is often proportioned to the strength rather of our language than of our feelings. But, if a deep and mortal blow be meditated, I apprehend the deviser, instead of suiting his expressions to his purpose, would endeavour by the smiles of his countenance, and the smoothness of his language, to conceal the rancour of his heart.

"Let any person, who has laboured under embarrassed circumstances; who has felt for the distress, for the impending ruin of his family; who has been chastised by the rod of power, reflect upon the expressions of resentment and of anguish which may have escaped him when his heart was open to a friend, when his passions were inflamed by liquor; and then let him condemn (if he can) the prisoner as a murderer, on account of the expressions of vengeance which are proved against him in the course of this trial.

"The only part of the evidence affecting the prisoner which makes a serious impression upon me, is what fell from Allan Breck in the wood of Kalisnacoan, that he was afraid lest the prisoner's son 'might be betrayed by his own tongue.' The following reasons, however, lead me to doubt the safety and propriety of making such an expression as this the foundation of taking away the life and fame of a prisoner. 1st. The witness who deposed to it trembled under the rod of power, he had been confined to close

custody in Fort William, and perhaps dreaded that he himself might be brought to trial for this murder. 2nd. The smallest variation from Allan Breck's expression, proceeding from misconception or want of memory in the witness, or from the mistake of the interpreter who translated the evidence, might make an important difference in the conclusion to be drawn from Allan Breck's words. For instance, if Allan Breck, instead of saying he was afraid the prisoner's son 'might be betrayed by his own tongue,' did say, he was afraid the prisoner's son 'might fall a victim to his own tongue;' in this case, Allan Breck would have said no more than what was notoriously just and true, viz., that the resentful expressions used by the prisoner and his son against Glenure would bear hard upon them."

We have then a suggestion for the amendment of the law in Scotland which bears on the proposal now made with such force for the entire assimilation of the Law between England and Scotland. "This trial, upon the whole, points out the propriety of two alterations being adopted in the Criminal Law of Scotland. 1. That the prisoner should here, as in England, have a power of challenging a certain number of the jurors, without cause assigned." 2. That to which we have already alluded, that on such an occasion the trial should take place out of the locality where the crime was committed.

The spirit of Christian meekness and forbearance displayed by the pannel throughout his long, tedious, and very painful trial, and also on hearing his sentence, has had few parallels, and well deserves to be recorded for our example; and it goes far to convince us of his innocence. Before receiving the holy communion, after having the necessity of confession and repentance set before him, he on being asked, "Are you guilty of the murder of Glenure?" asserted his entire innocence in the most solemn way. We cannot do better than conclude our account of this trial with a portion of his dying speech:—

"My dear countrymen;—The several motives that induced me to offer the world a narrative of my uncommon misfortunes, are as follows:—First of all, my innocence makes my sufferings easy, and alleviates all afflictions, be they never so severe in the eyes of

man. Secondly, that my silence upon this occasion might not be constructed to my prejudice by my prosecutors ; as my silence at the bar, when I was hearing some of the evidences aver untruths against me, was said to have proceeded from conviction of guilt, and that if I should challenge them, they might say more than they did. Thirdly, in order to let the world know the hardships put upon me since my confinement, contrary to the known laws of this nation, which effectually disabled me from making many defences I otherwise might produce. Fourthly, that it came to my ears my prosecutors had spread a false report, that I made a confession of that crime when in Inverary gaol after receiving my hard sentence. Fifthly, that I might offer my public advice to my friends and relations upon this melancholy occasion.

“ These are the chief reasons for the following narration of facts, which I hope to make appear so clear, as will convince the unprejudiced part of mankind how much I am injured, and that I die, as I endeavoured to live, an honest man.

“ As to the first article, of my being art and part accessory to Glenure’s murder, I positively deny, directly or indirectly, nor do I know who was the actor, further than my suspicion of Allan Breck Stewart, founded upon circumstances that have cast up since the murder happened ; and I do declare, that it was not from any conviction of his being guilty of that crime, I sent him money to carry him off the country ; but out of charity and friendship I had for him, not only as a relation, but likewise as a pupil left to my charge by his father, and as a person who had been kept close by my brother in his greatest distress, when lurking¹, before he got off the country ; and that I knew he was a deserter, so durst not stand a precognition. I also declare, it was without my knowledge he carried any part of my clothes with him, from my house, upon the Tuesday before the murder ; nor did I know where he was, or where he had gone to from that time, until Donald Stewart, nephew to Ballachelish, came to me on Friday, after that unlucky action happened, and told Allan Breck was at Kalisnacooan, and begged I might send him some money to help him off the country, as he durst not appear publicly, for fear of being secured, for the above reason of his being a deserter ; and the said Donald Stewart

¹ He here alludes to Ardsheel, the chief of the clan and his own foster-brother. After the battle of Culloden he was concealed for many days in a cave near Ardsheel House, under circumstances admirably described by Sir Walter Scott in Waverley, as occurring to the Baron Bradwardine. We have ourselves visited this cave.

told me, that Allan Breck assured him he had no hand in the murder.

“ I likewise declare, though it is set forth in my indictment, that Allan Breck frequented my house and company most of any place since he came to the country in March last, that I did not see him but thrice from his coming, till he went away from the country. The first time was two nights before I went to Edinburgh in the beginning of April last. The next, or second time, was about eight days after my return from Edinburgh, which was about the last days of April, as I best remember, when he stayed but one night that I was at home. The third, and last time, was upon the Monday before Glenure’s murder, that he came to my house about one of the clock after noon, and stayed that night; and the next morning I went from home, which was Tuesday, before he was out of bed; nor did I see him that day or since. Nor can I remember Glenure’s name was spoke of in his company either of the two last times, unless it was he that told me Glenure was gone for Lochabar upon the Monday, as to which I cannot be positive; but I am very sure there was no word of destroying him in any way spoke of. The first time he must have heard me talk of Glenure, as I told him I was going to give in a memorial for the tenants to the Barons of Exchequer.

“ It is also set forth in my indictment, that it was of my own accord, and not at the desire of the tenants, I went to make application for them in law. I do declare it was their desire that all lawful ways should be taken to keep them in possession, and do assure myself, that nothing obliged them to refuse that, but fear and ignorance; believing, that if they should own it, they would be made prisoners, as all the poor people were put in such a terror by a military force kept in different parts of the country, that they, I mean the poor country people, would say whatever they thought pleased my prosecutors best.

“ That there were plenty of bribes or rewards offered to severals, I am well assured. Particularly, Donald Ranken, herd to Ballac-helish, a young boy, was offered eighteen hundred merks; which are his own words; but he was kept close prisoner at Inverary, so that none of my friends had access to put any questions to him. John Maccombich, late miller in the mill of Ardsheel, was offered his [former possession of the mill, for telling anything would answer their turn. Duncan Maccombich and Duncan Maccoll, both in Lagnaha, were offered as much meal as they pleased to call for at Fort William, if they would make any discoveries.

"I now leave the world to judge what chance a man had for his life, when such bribes were offered to poor ignorant country people; or what assurance can any man have but such bribes prevailed with some of those who did make oath.

"As to the uncommon hardships put upon me under my confinement, they were many, such as being taken into custody without any written warrant, upon the 16th day of May last; carried through night to Fort William, where I was kept close prisoner; not allowed to see any of my friends, or any that could give me counsel, until, about the 20th of June, there came a letter from Mr. William Wilson, directed to my wife, with the Act of Parliament discharging close imprisonment longer than eight days; which, when shown to Colonel Crawford, who then commanded the fort and troops, he allowed my wife, and some others, to see me; but would not allow such as I thought could be of most use to me, to come near me, particularly Mr. Stewart, younger, of Ballachelish, who came with some law advices to me, would not be admitted; nor would Charles Stewart, writer, or William Stewart, merchant in Maryburgh, get any admittance. In short, any who could be supposed to be of any service to me in making my defences, were not permitted access to me. I do not impute this usage to Colonel Crawford, for whom I retain a very great regard, and who did not want humanity, had he not got a very bad impression of me from my prejudiced prosecutors. And when Colonel Crawford left Fort William, some time in the beginning of July, the new governor would allow none to come near me, turned my wife twice from the fort, and discharged her to stay in Maryburgh. And in that close situation was I kept, until the indictment came to hand about the latter end of August; so had no way to make up my defences; nor durst any of my friends in the country offer to do for me, otherwise would be laid up prisoners; and those who I expected had most to say for my exculpation, were taken prisoners.

"When my trial came on, I found it was not only Glenure's murder I had to answer for, of which, I thank God, my conscience could easily clear me, but the sins and follies of my forefathers were charged against me, such as the rebellion in 1715, in 1719, and 1745, so could not be allowed the character of an honest man, notwithstanding that, I firmly believe there was none present, but who was either himself, or came of people that were concerned in rebellion, some time or other. God forbid they should all be

called villains upon that account; as the greatest sinner, upon his repenting, may turn saint.

"I was a schoolboy in the year 1715, and was but little more in the year 1719, and if I had the misfortune to be concerned in the year 1745, I was indemnified, and have done nothing since to incur the government's displeasure that I am conscious of.

"Another surprising charge against a man in a Christian country came in against me,—which was, that I was a common parent to fatherless children, and took care of widows in the country, which gained me great influence over the people, by which they were much led by me, or some words to that purpose. I hope soon to appear before a Judge who will reward charity and benevolence in a different way; and I only regret how little service was in my power to do, not only to the fatherless and widows, but to all mankind in general, *as I thank God I would make all the race of Adam happy if I could.*

"Another charge, and a heavy one, was, that when subfactor to Glenure, I exacted more rents of the tenants than was paid to the exchequer, and which superplus rents I wrongously applied, either to my own use, or to the behoof of my brother Ardshiel's children. I own I did get some acknowledgments from some of the tenants, with the knowledge and consent of the factor, Glenure, and do declare that I was as assiduous as in my power, in acting for the benefit of said children, and that I did account to their behoof for all I could make of these lands, over and above the rent paid to the factor: and thought it no crime so to do; but to the contrary, thought it my duty, to which I was bound by the ties, not only of nature, but also of gratitude, being the distressed offspring of a very affectionate, loving brother, to whom I was under many obligations; and whose misfortunes (I am well assured) proceeded from a conviction of his doing his duty, which may be construed by some to be owing to the prejudice of his education. I do declare, that I made no confession of the crime alleged against me, at Inverary, or elsewhere, and that I had it not to make; nor can I remember that any there asked me the question, excepting Mr. Alexander Campbell, minister, who, I am persuaded, could not be capable of being author of that false calumny, which must have been raised by some malicious persons. May God forgive them! It is very true that I told Mr. Campbell I had no personal love for Glenure, and that I was sorry how few in his neighbourhood had. But I hope no man would construct that as if I had an intention to murder him.

"I also told him, that I had the charity to believe that the bulk of the jury thought I had some foreknowledge of the murder. Yet I still think, and not without some reason, that they gave themselves too little time to consider the proofs of either side, but gave in their verdict upon the prepossessed notion of guilt. What must convince all well thinking people of their being so prepossessed, is their stopping one of my lawyers twice in his speech to them after the witnesses were examined. Mr. Campbell, of South Hall, if I noticed right, was the first that interrupted my lawyer. There was some other who also spoke, and who I did not know. I am told this is not often practised in Christian countries, but there are many ways taken upon some emergencies for answering a turn, and it appears I must have been made a sacrifice, whoever was guilty.

"My dearest friends and relations, — I earnestly recommend, and entreat you, for God's sake, that you bear no grudge, hatred, or malice to those people, both evidence and jury, who have been the means of this my fatal end. Rather pity them, and pray for them, as they have my blood to answer for. And though you hear my prosecutors load my character with the greatest calumny, bear it patiently, and satisfy yourselves with your own conviction of my innocence. And may this my hard fate put an end to all discords among you, and may you all be united by brotherly love and charity.

"And may the great God protect you all, and guide you in the ways of peace and concord, and grant us a joyful meeting at the great day of judgment.

"I remember, Mr. Alexander Campbell, minister at Inverary, for whom I have a great value for his kind and good advices, told me, that the fear of discovering any of my friends might be a temptation to me from making any confession of my knowledge of that murder. Therefore, to do my friends justice, so far as I know, I do declare that none of my friends, to my knowledge, ever did plot or concert that murder; and I am persuaded they never employed any person to accomplish that cowardly action; and I firmly believe there is none of my friends who might have a quarrel with that gentleman, but had the honour and resolution to offer him a fairer chance for his life than to shoot him privately from a bush.

"Mr. Brown, of Colston, Mr. Miller, Mr. Stewart, younger, of Stewarthall, and Mr. Macintosh, were my counsel; and Mr. Stewart, of Edinglassie, my agent. *I do declare, that I am fully*

satisfied they did me justice, and that no part of my misfortune was owing to their neglect, or want of abilities; and as they are men of known honour, I hope they will do justice to my behaviour during the trial. I give it as my real opinion, that if Allan Breck Stewart was the murderer of Glenure, that he consulted none of his friends about it. I conclude with my solemn declaration, that I tamely submit to this my lot, and severe sentence, and that I freely resign my life to the will of God, that gave me my first breath; and do firmly believe, that the Almighty God, who can do nothing without a good design, brought this cast of Providence in my way for my spiritual good.

“I die an unworthy member of the Episcopal Church of Scotland, as established before the revolution, in full charity with all mortals, sincerely praying God may bless all my friends and relations, benefactors, and well-wishers; particularly my poor wife and children, who in a special manner I recommend to his divine care and protection; and may the same God pardon and forgive all that ever did, or wished me evil, as I do from my heart forgive them. *I die in full hopes of mercy, not through any merit in myself, as I freely own I merit no good at the hand of my offended God; but my hope is through the blood, merits, and mediation of the ever blessed Jesus, my Redeemer and glorious Advocate, to whom I recommend my spirit. Come, Lord Jesus, come quickly.*”

We have thought it right to give, at some length, a defence, which appears to us a model of its kind, and to show in every word, the gallant gentleman and sincere Christian; nor do we know a more affecting speech on record. It need not be added that the prisoner was executed in pursuance of the verdict of the jury, he having, it is said, down to the fatal day, “behaved in every respect so like a good Christian that his greatest enemies were forced to commend him.”

We have laid this trial before our readers from its general interest, and because we were desirous of correcting some erroneous statements respecting it in some recent works, but chiefly because we think a rule may be drawn from it not uninteresting to the cause of Law Amendment, or unimportant to the political condition of this country, although not bearing directly, at the present time, upon Scotland. The majesty of the law must be successfully vindicated, and to carry out the best devised and most hopeful measures for

the amelioration of Ireland, the rights of life and property must be protected. The operations of the Incumbered Estates Commission are vain, unless the purchasers under it can buy safely, and enjoy their purchases securely. Perhaps this trial may show the proper remedy for much evil now occurring in Ireland, to be in the hands of the Legislature. Let all offences connected with the occupation of land be tried before an English jury; no one can suppose that in such a matter an undue bias would exist against any one accused; but the conspirator and the assassin might thus be taught a lesson, which he has yet to learn, that punishment is, even in this world, the certain consequence of a well proved crime.

ART. VII.—THE HISTORY OF JURISPRUDENCE.

No. III.¹

§ 1.² UPON the revival of learning in Europe, the term Jurisprudence was not used to designate that department of mental science which treats of the rules of universal justice. In its primary sense, the word Jurisprudence was used to denote the knowledge of the Roman Law. The science of Law in Europe dates from the twelfth century. It was then associated with theology and scholasticism. Irnerius was the contemporary of Abelard.

During four centuries from the year 1100 the Civil Law was zealously cultivated in Italy; and simultaneously the Feudal and Canon Laws acquired a systematic form. The Feudal System obtained complete dominion over the tenures of land; the Canon Law regulated the ecclesiastical relations of the States of Europe,—and having been originally but the rule of the Christian Church, it acquired the stability and authority of Positive Law, under Gregory VII., in the thirteenth century.

¹ See Nos. I. and II., vol. xvi. pp. 59. and 298.

² Jurisprudence, 1100—1500.

The first professors of the Civil Law appeared in the Italian cities. Irnerius, by universal testimony, was the founder of all learned investigation into the Laws of Justinian. He gave lectures on them at Bologna soon after the commencement of the twelfth century. The freedom of the Italian Republics rendered the Profession of the Law honourable; and the Doctors of the Law were frequently called to the office of Podesta, or Criminal Judge. Irnerius commenced the custom of making glossaries, which long continued to be the only attempts at legal literature. A gloss properly meant a word from a foreign language, or any difficult word which required interpretation. It was afterwards used for the interpretation itself. The first glosses were interlinear; they were afterwards placed in the margin, and were finally extended to a sort of running commentary on the entire book. An example of this latter kind of glossary is the commentary of Coke upon Littleton's Tenures.

Thus Italy, the cradle of the Roman Law, was also the theatre of its renovation. The prosperity of the Lombard cities, and their love of independence, gave to civil and political life new events and new activity. The old laws of the barbarians could not satisfy the novel principles which struggled for development, and the study of the learned was directed to the Roman Law. During the space of a century from the time that Irnerius commenced the system of glossaries, each glossator wrote much to show his independence and genius; the glosses had multiplied into a huge and inconsistent bulk, and a digest was required. This work was accomplished by Accursius¹ the Florentine. The digest of Accursius—"Corpus Juris Glossatum"—is described by Eichhorn as remarkable as well for its barbarous style and gross mistakes in history, as for the solidity of its judgments and practical distinctions. Savigny, however, speaks but slightly of this laborious compilation. To these succeeded Bartolus.² He appears at the head of the scholastic jurists. The fame of the schoolmen excited the emulation of the

¹ Accursius, born 1182, died 1260. The best edition of his works is that of Denis Godefroi, Lyons, 1589, 6 vols. fol.

² Bartolus, born 1303, died 1359.

lawyers to use the dialectic method. Thus during three centuries spent in the study of the Roman Law the science of Law had not yet passed out of a trivial exegesis, which employed in its service neither history nor literature. And this school of jurists, feebly cultivating only the Civil Law, lasted to the close of the fifteenth century.

§ 2.¹ Next after the attempts of the Italian civilians in the Middle Ages, some of the first essays upon Jurisprudence were directed to the consideration of International Law. The Law of Nations was unknown as a science to the ancients. The *Jus Feciale* amongst the Romans could have been of but little importance, since not the faintest trace of its doctrines has survived to modern times. Their *Jus Gentium* was what we term Natural Law. Thus Ulpian² says:—“*Jus gentium est quo gentes humanæ utuntur; quod a naturali recedere facile intelligere licet; quia illud omnibus animalibus, hoc solis hominibus inter se commune est.*”

Nor had Tribonian, or the other jurists who compiled the “*Institutes*” and “*Digest*” from the writings of the classical juriconsults of Rome, any other idea of the Law of Nations than that comprised in Ulpian’s definition.

As the revival of Western civilisation arose in the commercial republics upon the coast of the Mediterranean, accordingly the first rules of International Law appear in the customs of Venice, Genoa, Marseilles, Barcelona, and the other trading republics of the Middle Ages during their mutual wars. Machiavelli, a citizen of Florence, early in the sixteenth century, wrote systematic political treatises. Vasquez and Suarez, the learned Spanish Jesuits, wrote on Jurisprudence. And these are among the first eminent authors in modern history treating of the science of Law. For from the sixth to the fifteenth century, both inclusive, not a single writer of any note either upon General Jurisprudence or the Law of Nations appears.

In 1506, Oldendorp, afterwards professor at Marburg, published a work, which may be considered as the first system

¹ Jurisprudence, 1500—1550.

² Hugo’s ed. 1822.

of Natural Law. The title is, "Isagoge, seu elementaria introductio Juris Naturæ, Gentium, et Civilis." Oldendorp perceived the distinction between the *Jus Gentium* and the *Jus Naturæ*; but he had no accurate idea on the subject.¹

Ulric Zazius, a professor at Friburg, and Garcia d'Erzila, 1515, according to Andrès, have the merit of extricating the Roman Law from the glossators and scholastics. Alciati, of Milan, however, has more generally the reputation of the introduction of a better system. He taught, from 1518 to 1550 in the universities of Avignon, Milan, Bourges, Paris, and Bologna. Alciati has had the merit of being the first modern jurist to write with purity and elegance. He was placed at the University of Bourges by Francis I. And the French school of jurists, so founded, has produced Cujas, L'Hopital, Godefroï, Domat, D'Aguesseau, and Pothier.

Vasquez, who flourished between 1509 and 1566, in his "*Controversiæ Illustres*," first divided the Law of Nations into primary and secondary. By the former he understood the mere law of nature; by the latter the civil laws, institutions, and ordinances, adopted by the greater part of nations.

According to Vasquez, the secondary Law of Nations is not so much natural as positive; for all those things which belong to the Law of Nations were first only matters of Civil Law, but by degrees spread to other nations and states. And thus, as soon as anything was invented and accepted by any one man or region, it then was only a matter of Civil Law, not of the Law of Nations. Afterwards, however, when all, or almost all of the nations begin to use a custom, it appears effectively changed into the Law of Nations. On the contrary, also, if whatever now be of the Law of Nations — *Jus Gentium* — were to come into disuse, so as to remain almost with only one province, it would almost unquestionably cease to belong to the *Jus Gentium*, and be only a matter of Civil Law.² This is a most confused idea of the Law of Nations.

¹ Reddie's International Law, p. 22.

² Ibid.

As in Italy the study of the Civil Law was first revived, so Political Jurisprudence here first received an elaborate scientific cultivation. And the first great writer in politics, after the revival of learning, is the celebrated Niccolo Machiavelli.¹

Of all writers on Political Philosophy, none have received so general a condemnation.² The treacheries of the tyrants of the age in which he lived have been attributed to his political writings; and he has been commonly described as the discoverer of ambition and revenge—the original inventor of perjury among princes.³ Yet, even if his political works² on the whole displayed nothing but the scientific atrocity in which Milton's fiends would have exulted, it would still be necessary for the historian of Jurisprudence to peruse and consider them as the results of the political experience and political wisdom of the age in which they were composed. The vices of the Italians of the middle ages, like those of the Greeks in their decline, sprung from the necessities of their position. They possessed the highest civilisation of the age in which they lived. Almost alone of nations, they cultivated literature and the arts. But the merchant aristocracy of Florence, Pisa, Genoa, and Lucca were unable to furnish from their republics soldiers to cope with the rude barbarians of France, Switzerland, and Arragon. Open force they were compelled to meet with secret treachery. Barbarian violence they sometimes defeated with poison and assassination. By such policy on the part of their rulers, the civilisation of the Italian republics was for a time preserved. Let that civilisation atone to the world for the treacherous policy by which its rulers, for a time, maintained themselves in power. The names of Dante, Petrarch, and Boccaccio, Cimabue, Raffaele and Michael Angelo, outweigh the cruelties of the Borgias. And let not the age which has witnessed

¹ Niccolo Machiavelli, born 1469, died 1527.

² Macaulay's Essay, 1843, vol. i. p. 62.

³ Opere di Niccolo Machiavelli, Cittadino e Segretario Fiorentino, vol. x. 1826. Œuvres Complètes de Machiavel, traduites par J. V. Perier, Paris, 1825. Machiavel, son Génie et ses Erreurs, tom. xi. Par A. F. Arland, 1833. The Works of the famous Nicholas Machiavel, Citizen and Secretary of Florence. London, Starkey, 1675.

the splendid triumph of Louis Napoleon be too severe on the author who scientifically treated of that princely dissimulation without which perchance princes could not have then existed. Political truth can only be discovered by the study and analysis of the past. And succeeding ages will regard even the open wars of the nineteenth century with the same detestation which we entertain towards the secret crimes of the Borgias.

To the jurist, the study of the history of the Italian Republics is peculiarly interesting. With them first, after the dissolution of the Roman empire, began the science of governing men for their advantage.¹ Former governments had been but the tyrannies of armies over subjected slaves. In the petty Italian republics were victors and vanquished fused into one people, united by a single bond — the public good.

The Italian cities for the most part date the commencement of their liberties from the invasion of Otho the Great in 951.² For three centuries, during which history is almost silent concerning them, they laboured, and flourished in their labour. At the close of the thirteenth century a degree of prosperity had been attained which Italy may now look back to with regret. Then were perfected the great works of industry which still fertilise the land. The *Naviglio Grande* of Milan, which yet spreads the clear waters of the Ticino over Lombardy, was begun in 1179, and terminated in 1262. If we turn to the cities, we see them adorned by the palaces of the aristocracy, enriched with the finest works of sculpture — the streets paved with broad flag stones. Whilst, at the same time, the nobles of Germany and England, in building their castles, thought not of beauty, but only of defence, and the streets of Paris were almost impassable from mud.

The crusades had brought to the Republics of Italy a large increase of wealth. The great maritime states of Venice, Genoa, and Pisa united their fleets to fight the Turks and pirates, — or, delivered from those foes, they fought amongst

¹ Sismondi's *History of the Italian Republics*, London, 1832, p. 1.

² *Ibid.*, p. 78.

themselves for supremacy. "Genoa la superba" had already built the palaces now, after six centuries, the wonder and admiration of travellers. She maintained military and mercantile colonies at St. Jean d'Acre in the Holy Land; at Pera, opposite Constantinople, and at Caffa, in the Black Sea. Pisa was already celebrated for the "profusion of marble, its patrician towers, and its great magnificence." She had conquered Sardinia and the Balearic Isles; and was the first to introduce into Tuscany the arts which ennoble wealth. Her Dome, her Baptistery, her leaning tower, and her Campo Santo, had been successively built from the year 1063 to the end of the twelfth century. The churches of Santa Croce and Santa Maria were begun. They are not finished yet.¹

John Villani has given us an ample and precise account of the state of Florence in the early part of the fourteenth century. The revenue of the Republic amounted to three hundred thousand florins, a sum which, allowing for the depreciation of the precious metals, was at least equivalent to five hundred thousand pounds sterling — a larger sum than England and Ireland, two centuries ago, yielded to Elizabeth. The manufacture of wool alone employed two hundred factories, and thirty thousand workmen. The cloth annually sold produced a sum equal in exchangeable value to two millions and a half of our money.

Eighty banks conducted the commercial transactions of Florence. The city and its environs contained one hundred and seventy thousand inhabitants.²

But during the period of this greatest prosperity of Florence, culminating in the age of Lorenzo the Magnificent, England was distracted by the Civil Wars of the Roses. The battles of Northampton, Wakefield, St. Albans', Towton, Barnet, and Tewkesbury, are the historical events. France was desolated by the English wars and the Jacquerie. Both countries exhibit a miserable spectacle of poverty and barbarity. In both the name of scarcely a single great man appears. These miseries then existed in France and Eng-

¹ Characteristics of Men of Genius. Chapman, vol. i. p. 129.

² Macaulay's Essays, vol. i. p. 71.

land, now the seats of the most flourishing nations, — the most advanced and refined civilisations. But Florence, built of marble, and robed in the silks of the East, was then successively ennobled by the divine melancholy of Dante, the mirth of Pulci, the political wisdom of Machiavelli, the magnificence of Lorenzo de Medici.

A great blot appears upon all this Italian prosperity. The refined Italian merchants had not the leisure which then was necessary to men who desired to be trained as soldiers. The strength of armies lay in their cavalry. These were covered from head to foot with iron, and armed with ponderous lances. No infantry of the day was supposed capable of withstanding their charge. But it required the labour of years to train the man-at-arms to sustain his armour and wield his spear. It would have been well for the prosperity of the Italian States if they had had political wisdom to adopt the expedient of standing armies; — if some portion of their own citizens had been armed by them for the common defence. Then some patriotism animates the soldier, and he is unwilling to imbrue his sword in his country's blood. But they do not appear to have thought of this modern discovery in political science.¹ On the contrary: mercenary foreign soldiers alone were employed; ever ready to sell their lances to the best bidder, and to turn them to-morrow against the State which employed them to-day.

From the difficulties of their position arose the character of the statesmen of the Tuscan and Lombard Republics. They were traitors and assassins. They knew not and despised military courage, — the sole virtue of the licentious and drunken soldiers who came from beyond the Alps. But at the same time they cultivated eloquence, poetry, and the fine arts with complete success. Machiavelli, in his public conduct, was upright and honourable; but for having, amongst his own discoveries in political science, scientifically treated of the opinions current in the fashionable morality of the day, he has been unsparingly gibbeted by posterity.

In times such as these he flourished. Niccolo Machiavelli

¹ Macaulay's *Essays*, vol. i. p. 79.

was born at Florence on the 5th of May, 1469, of a poor, old, and noble family. We know nothing about his youth, and all that can be gathered from his own writings consists of a few brief allusions to his dependence and poverty.¹ His talents must have rapidly attracted the notice and commendation of the statesmen of the time; and we find him in 1498, being then only twenty-nine years of age, appointed by the "Ten of Liberty and Peace" the secretary of the Florentine Republic. This was the government, the remnant of the ancient oligarchy, which ruled Florence between the expulsion of the Medici in 1494, and their return in 1512.² For fourteen years he was thus employed, or on the numerous embassies which Florence despatched to the Courts of Europe. But when the popular government was overthrown, and the Medici returned to Florence supported by the arms of Spain, Machiavelli was arrested, on a charge of conspiracy against the new government, imprisoned, and tortured with "the cord." Immediately after this he composed his great political works; but none of his writings were published during his life, and they first appeared at Rome in 1532, with an approbation of the Pope.³

"The Prince," — the work by which Machiavelli is best known to those who unsparingly condemn him, — was dedicated to Lorenzo de Medici. This book was written in 1513, after the fall of the Republican Government at Florence; when Machiavelli, living in retired poverty, and despairing of the liberty of his country, was disposed to support any government which might secure her independence.⁴ He naturally felt the reluctance of every man of talent who has once been employed in political affairs to waste the best years of his life in idleness. And he wrote "The Prince" to recommend himself to the notice of the Medici. He thought it better to serve some master usefully for the State than to remain in poverty and obscurity.⁵

¹ Characteristics of Men of Genius, vol. i. p. 194.

² Hallam's Literature of Europe (second edition, 1843), vol. i. p. 395.

³ Ibid. p. 395.

⁴ Macaulay's Essays, vol. i. p. 102.

⁵ Hallam's Literature of Europe, vol. i. p. 395.

"The Prince" commences with a dissertation upon the several sorts of government, which Machiavelli divides first into commonwealths and monarchies, and these again into hereditary and mixed. The latter term he applies to a monarchy in which are territories lately annexed to the dominion of the conqueror. He also applies the term to cases where the new acquisition arises from the talent of a prince in subverting the liberties of a people and acquiring absolute power for himself. In the third chapter occur some of the politic maxims of kingcraft, which have been so censured. Thus, speaking of the manner in which to treat a conquered province, he says : —

"It is to be observed, men are either to be flattered and indulged, or utterly destroyed; because for small offences they do usually revenge themselves, but for great ones they cannot; so that injury is to be done in such a manner as not to fear any revenge."¹

Again, he says in chapter iii. : —

"That it is very obvious, and no more than natural, for princes to desire to extend their dominion, and when they attempt nothing but what they are able to achieve, they are applauded, at least not upbraided thereby; but when they are unable to compass it, and yet will be doing, then they are condemned, and indeed not unworthily. If France then with its own forces alone had been able to have enterprised upon Naples, it ought to have been done; but if her own private strength was too weak, it ought not to have been divided; and if the division of Lombardy, to which she consented with the Venetians, was excusable, it was because done to get footing in Italy. But this partition of Naples with the King of Spain is extremely to be condemned, because not pressed or quickened by such necessity as the former. Louis, therefore, committed five faults in this expedition. He ruined the inferior lords; he augmented the dominion of a neighbour prince; he called in a foreigner as puissant as himself; he neglected to continue there in person; and planted no colonies; all which errors might have been no inconvenience whilst he lived, had he not been guilty of a sixth, and that was depressing the power of the Venetians. If indeed he had not sided with the Church, nor brought the Spaniards into Italy, it had been but reasonable for him to have

¹ In the quotations the translation of 1675 is used. In some instances the spelling is modernised.

taken down the pride of the Venetians; but pursuing his first resolutions, he ought not to have suffered them to be ruined, because whilst the Venetian strength was entire, they would have kept off other people from attempting upon Lombardy, to which the Venetians would never have consented, unless upon condition it might have been delivered to them, and the others would not in probability have forced it from France, to have given it to them; and to have contended with them both, nobody would have had the courage. . . . So then King Louis lost Lombardy, because he did not observe one of those rules which others have followed with success in the conquest of provinces, and in their desire to keep them; nor is it an extraordinary thing, but what happens every day, and not without reason. To this purpose, I remember I was once in discourse with the Cardinal d'Amboise, at Nantes, at the time when Valentino possessed himself of Romagna. In the heat of our conference he telling me that the Italians were ignorant of the art of war; I replied that the French had as little skill in matters of state; for if they had had the least policy in the world, they would never have suffered the Church to come to that height and elevation. And it has been found since by experience, that the grandeur of the Church and the Spaniard in Italy is derived from France, and that they in requital have been the ruin and expulsion of the French. From hence a general rule may be deduced, and such a one as seldom or never is subject to exception, viz., *that whoever is the occasion of another's advancement, is the cause of his own diminution*; because that advancement is founded either upon the conduct or power of the donor, either of which becomes suspicious at length to the person preferred." ¹

The chapters on the military force of a State are interesting; the first assumes, as an unquestionable truth, that good laws and good arms are the principal foundation of every State. He describes the different kinds of troops then in use; and, in bold and powerful language, paints the destruction which is inevitable to any State that relies upon foreign mercenary forces. And in chapter xiii. he draws the conclusion, that without having proper and peculiar forces of his own, no prince is secure, but depends wholly upon fortune, as having no native and intrinsic strength to sustain him in adversity.²

¹ Translation, p. 203.

² Translation, p. 218.

Chapter xvii. is headed "Of Cruelty, and Clemency, and whether it is best for a Prince to be beloved, or feared." He says,—

"Every prince is to be esteemed rather merciful than cruel, but with great caution, that his mercy be not abused. Cæsar Borgia was counted cruel, yet that cruelty reduced Romagna, united it, settled it in peace, and rendered it faithful ; so that if well considered, he will appear much more merciful than the Florentines, who, rather than be thought cruel, suffered Pistoia to be destroyed. A prince, therefore, is not to regard the scandal of being cruel, if thereby he keeps his subjects within their allegiance and united, seeing by some few examples of justice you may be more merciful than they who by a universal exercise of pity, permit several disorders to follow, which occasion rapine and murder ; and the reason is because that exorbitant mercy has an ill effect upon the whole universality, whereas particular executions extend only to particular persons. . . . And from hence arises a new question, '*Whether it be better to be beloved or feared, or feared than beloved.*' It is answered, both would be convenient, but because that is hard to attain, it is better and more secure (if one must be wanting) to be feared than loved ; for in the general men are ungrateful, inconstant, hypocritical, fearful of danger, and covetous of gain : whilst they receive any benefit by you, and the danger is at a distance, they are absolutely yours ; their blood, their estates, their lives, and their children (as I said before) are all at your service ; but when mischief is at hand, and you have present need of their help, they make no scruple to revolt. And that prince who leaves himself naked of other preparations, and relies wholly upon their professions, is sure to be ruined ; for amity contracted by price, and not by the greatness and generosity of the mind, may seem a good pennyworth, yet when you have occasion to make use of it, you will find no such thing. Moreover men do with less remorse offend against those who desire to be beloved, than against those who are ambitious of being feared, and the reason is because love is fastened only by a ligament of obligation, which the ill nature of mankind breaks upon every occasion that is presented to his profit ; but fear depends upon an apprehension of punishment, which is never to be dispelled."¹

But in the eighteenth chapter the principles of this crooked policy are carried to the utmost extent. He says,—

¹ Translation, p. 221.

“How honourable it is for a prince to keep his word, and act rather with integrity than collusion, I suppose everybody understands; nevertheless experience has shown in our own times, that those princes who have not pinned themselves up to that punctuality and preciseness have done great things, and by their cunning and subtlety not only circumvented and darted the brains of those with whom they had to deal, but have overcome and been too hard for those who have been so superstitiously exact. For further explanation you must understand that there are two ways of contending, by law and by force; the first is proper to men, the second to beasts; but because many times the first is insufficient, recourse must be had to the second. It belongs therefore to a prince to understand both, when to make use of the rational, and when of the brutal way. . . . A prince, therefore, that is wise and prudent, cannot nor ought not to keep his parole, when the keeping of it is to his prejudice, and the causes for which he promised removed. Were men all good this doctrine was not to be taught; but because they are wicked, and not likely to be punctual with you, you are not obliged to any such strictness with them; nor was there ever any prince that wanted lawful pretence to justify his breach of promise. I might instance in many modern examples, and show how many considerations, and peaces, and promises have been broken by the infidelity of princes, and how he that best personated the fox had the better success. Nevertheless it is of great consequence to disguise your inclination, and play the hypocrite well; and men are so simple in their temper, and so submissive to their present necessities, that he that is neat and cleanly in his collusions, shall never want people to practise them upon. I cannot forbear one example which is still fresh in our memory. Alexander VI. never did nor thought of anything but cheating, and never wanted matter to work upon; and though no man promised a thing with greater asseveration, nor confirmed it with more oaths and imprecations, and observed them less, yet, understanding the world well, he never miscarried. A prince, therefore, is not obliged to have all the forementioned good qualities in reality; but it is necessary to have them in appearance: nay, I will be bold to affirm, that having them actually, and employing them upon all occasions, they are extremely prejudicial,—whereas, having them only in appearance, they turn to better account. It is honourable to seem mild and merciful, and courteous and religious and sincere, and indeed to be so, provided your mind be so rectified and prepared that

you can act quite contrary upon occasion. And this must be premised, that a prince, especially if come but lately to the throne, cannot observe all those things exactly which make men be esteemed virtuous, being oftentimes necessitated, for the preservation of his State, to do things inhuman, uncharitable, and irreligious, — and therefore it is convenient his mind be at his command, and flexible to all the puffs and varieties of his fortune; not forbearing to be good, whilst it is in his choice, but knowing how to be evil when there is a necessity. A prince, then, is to have particular care that nothing falls from his mouth but what is full of the five qualities aforesaid, and that to see and to hear him he appears all goodness, integrity, humanity, and religion; which last he ought to pretend to more than ordinarily, because more men do judge by the eye than by the touch, for every body sees, but few understand; everybody sees how you appear, but few know what in reality you are, and those few dare not oppose the opinion of the multitude who have the majesty of their prince to defend them; and in the actions of all men, especially princes, where no man has power to judge, every one looks to the end. Let a prince, therefore, do what he can to preserve his life and continue his supremacy; the means which he uses shall be thought honourable, and be commended by everybody; because the people are always taken with the appearance and the event of things, and the greatest part of the world consists of the people; those few who are wise taking place when the multitude has nothing else to rely upon. There is a prince this time in being (but his name I shall conceal) who has nothing in his mouth but fidelity and peace, and yet had he exercised either one or the other, they had robbed him before this of his power and reputation."

This passage has condemned Machiavelli as a black-hearted traitor. Yet most of the other principles in the book are good. He advises economy to the Prince, that he may not be the oppressor of his subjects. He should cultivate rigid and severe justice as the surest road to mercy. He should preserve respect for religion, avoid flatterers, secure the free advice of the wisest of his subjects. In truth, all the political philosophy of Machiavelli will bear the light and experience of the nineteenth century, save the passages which show the means whereby absolute power is to be acquired and preserved. And if a statesman were now to write how absolute power is to be acquired and maintained, he would write the

same as Machiavelli did three centuries and a half ago. In fact, all the acts of tyranny which we read of in Machiavelli had been previously unfolded by Aristotle.¹ What is, in its nature, repugnant to truth and justice, can only be maintained by perjury and injustice. The Commentary of Machiavelli, on absolute power, merely places in a scientific formula a digest of the principles of tyranny. Christian endurance tells us it is better not to exist at all than to exist at the price of virtue: but however this virtue has been practised by the martyrs and saints of God, it has not yet arrived at the region of governments. And Machiavelli boldly cast off the veil of hypocrisy by which the villanies of tyrants have been concealed.

“The Prince” concludes with an exhortation to deliver Italy from the barbarians: —

“Though, formerly, some sparks of virtue have appeared in some persons that might give her hopes that God had ordained them for her redemption; yet, it was found afterwards, that in the very height and career of their exploits they were checked and forsaken by fortune, and poor Italy left half dead, expecting who would be her Samaritan to bind up her wounds, put an end to the sackings and devastations in Lombardy, the taxes and expilations in the kingdom of Naples and Tuscany, and cure her sores which length of time had festered and imposterated. ’Tis manifest how she prays to God daily to send some person who may redeem her from the cruelty and insolence of the barbarians. ’Tis manifest how prone and ready she is to follow the banner that any man will take up; nor is it at present to be discerned where she can repose her hopes with more probability than in your illustrious family, which, by its own courage and interest, and the favour of God and the Church, (of which it is now chief) may be induced to make itself head in her redemption This opportunity, therefore, is by no means to be slipped, that Italy after so long expectation may see some means of deliverance. Nor can it be expressed, with what joy, with what impatience of revenge, with what fidelity, with what compassion, with what tears, such a champion would be received into all the Provinces that have suf-

¹ Aristotle’s *Politics*, l. v. c. 11. Hallam’s *Literature of Europe*, vol. i. p. 398, note.

fered by these barbarous inundations. What gates would be shut against him? What people would deny him obedience? What malice [would oppose him? What true Italian would refuse to follow him? There is not anybody but abhors and nauseates this barbarous domination. Let your illustrious family then address itself to this work with as much courage and confidence as just enterprises are undertaken; that under their ensigns our country may be recovered, and under their conduct Petrarch's prophecy may be fulfilled, who has promised that,

“ Virtù contr' al furore
Prendera l' arme, et fia il combatter corto,
Che l' antico valore
Ne' gl' Italici non e ancor morto.”

Frederick Schlegel believed that the object of Machiavelli was, to inspire the great Princes of Italy with the ambition of giving liberty to his country: and that, in this cause, it was right to make use of those unrighteous means by which others had effected her degradation.¹ He has also pointed out, that in his opinion, the chief fault of Machiavelli consists not in his defence of the principle that the end sanctifies the means, but in this, that he was the first who introduced into modern and Christian Europe the fashion of reasoning and deciding on politics exactly as if Christianity had no existence. When we are impressed with a sense of the existence of God, the whole of our thoughts and principles have acquired a dignity to which we could not otherwise aspire. The visible is everywhere dependent on the unseen; and as the body is moved and regulated by the soul, so are men, nations, and states held together by the belief and the reverence of the Godhead. The moment we take away this soul, this internal and universal principle of life, the whole composition is loosened and destroyed: if we obscure its light, and obstruct its influence upon the whole, the individual members of the organic or of the political body may still preserve some power of life with them; but this life will be narrow, separate, insignificant, misdirected and destructive, rather than beneficial. It will form a principle of disunion, not a bond of harmony. When that chain of

¹ Schlegel's Lectures on the Hist. of Lit. Lecture ix.

morality and religion, by which states and nations are connected together, has once fairly been broken, the destructive poisons of darkness, anarchy, and despotism begin immediately to operate, and vice is ever ready to occupy the deserted station of virtue.¹

But in his succeeding political works we find a development of most that is good in "the Prince," with some opinions directly the reverse of the censurable portions. The "Discourses on the First Decade of Livy" were written about a year after the composition of "the Prince." They give the author's views on some questions of Republican Government. After the fashion of the discourses of the Greek philosophers, these were recited to the young men of Florence in the gardens of Cosimo Rucellai. His Discourses on Livy are divided into three books. In the first he treats of the internal government of the Romans, but introduces much historical learning and illustration, and discusses many political principles.

In one passage he recommends, like Cicero and Tacitus, a triple form of government.² The wisest legislators, finding the defect of want of permanence in the simple forms of monarchy, aristocracy, and democracy, and avoiding every one of these kinds, they framed a government which should consist of them all, believing it to be more permanent and stable because prince, nobles, and people, living in the same city, and communicating in the same government, they would be all of them in sight of one another, and more capable of correction. He considered, without this, that the simple forms of government, monarchy, aristocracy, and democracy, would necessarily pass from one to another in the cycle of ages. Byron, imitating the same idea, also has said,—

" There is the moral of all human tales,
'Tis but the same rehearsal of the past :
First freedom, and then glory, when that fails,
Wealth, vice, corruption, barbarism at last,
And history with all her volumes vast
Hath but one page."⁴

¹ Schlegel, Lecture ix.

² Ibid.

³ Translation, p. 271.

⁴ Childe Harold, canto iv. st. 108.

But in the development of the representative system of government and individual liberty there appears to be some security for permanent progress.

In the tenth chapter Machiavelli praises those who lay the foundations of a commonwealth. Among all excellent and illustrious men, they are the most praiseworthy who have been the chief establishing of religious and divine worship; in the second place are they who have laid the foundations of any kingdom or commonwealth; in the third those who, having the command of great armies, have enlarged their own or the dominion of their country. In the next, learned men of all sciences, according to their several studies and degrees; and last of all (as being infinitely the greater number) come the artificers and mechanics, — all to be commended as they are ingenious or skilful in their professions. On the other side, they are infamous and detestable who are contemners of religion, subverters of governments, enemies of virtue, of learning, of art, and, in short, of every thing that is useful to mankind, and of this sort are the profane, the seditious, the ignorant, the idle, the debauched, and the vile. And although Nature has so ordered it that there is neither wise man nor fool, nor good man nor bad, who, if it were proposed to him which he would choose of these two sorts of people, would not prefer that which was to be preferred, and condemn the other; yet the generality of mankind, deluded by a false impression of good and a vain notion of glory, leaving those ways which are excellent and commendable, either wilfully or ignorantly wander into those paths which will lead them into dishonour; and whereas to their immortal honour they might establish a commonwealth or kingdom as they please, they run headlong into a tyranny, not considering what fame, what glory, what affection, what security, what quiet and satisfaction of mind, they part with, nor what reproach, scandal, hatred, danger, and disquiet they incur.¹

He proceeds to show how a people accustomed to the dominion of a prince, though by accident they may acquire their liberty, yet can maintain it with difficulty; and that a

¹ Translation, p. 281.

people wholly corrupted in their manners may possibly recover their liberty, but they will find insuperable difficulty to maintain it; and how much that prince or commonwealth is to be condemned that neglects to train up native soldiers.

In the fifty-eighth chapter he advances an opinion which now is held by most political writers, but certainly was then a novel in politics, that the multitude is wiser and more constant than a prince:—

“I know not whether I shall not seem too bold, to undertake the defence of a thing which all the world opposes, and run myself upon a necessity of either quitting it with disgrace, or pursuing it with scandal; yet, methinks, being to maintain it with arguments, not force, it should not be so criminal. I say then, in behalf of the multitude, that what they are charged withal by most authors, may be charged upon all private persons in the world, and especially upon Princes; for whoever lives irregularly, and is not restrained by the law, is subject to the same exorbitancies, and will commit as bad faults as the most dissolute multitude in the world. . . . And if the comparison be made betwixt mixed principalities that are circumscribed and bounded by laws and popular governments under the same ties and restrictions, the People will be found more virtuous than the Princes; but if it be betwixt loose and dissolute governments, both of the one kind and of the other, the errors on the side of the Princes will appear more great, more numerous, and more incapable of redress: for, in popular tumults, a sober man may interfere, and, by fair words, reduce them to reason; but to an enraged Prince who dares intercede, or what remedy is there to repair to, but violence and the sword? From whence we may judge and distinguish betwixt the inconvenience of the one and the other: the People are appeased with gentleness and good words; and the Prince not to be prevailed upon but by violence and force; and, if it be so, who will deny that the disease is more dangerous where the cure is most difficult? Moreover, when the People tumultuate, there is not so much fear of any present mischief that they are likely to commit as of the consequences of it, and that it may end in a tyranny. But with ill Princes it is quite contrary; the present misery is the most dreadful, because they hope when he dies their liberty may be recovered. You see, then, the difference betwixt them,—one is more dangerous for the present, and the other for the future; the cruelty of the People

extends only to such as in their opinion conspire against the common good. The severity of the Prince is more against them who design against his particular interest.”¹

He again treats of the danger of employing foreign forces. In prudence, a prince or commonwealth is to take any course rather than to bring himself into a necessity of employing auxiliaries, especially when he is to rely wholly upon them.² Nor can an ambitious state or prince have a more commodious occasion to possess himself of a city or province, than when he is invited in this manner for its assistance and defence.

He also insists on the necessity of constant reforms in a State. It is as clear as the day that no bodies of men are of long duration unless they be renewed. And the way to renew them is to reduce them to their first principles. For the foundations of all sects, commonwealths, and kingdoms have always something of good in them.³ These discourses on Livy have no regular arrangement, so that nearly the same thoughts occur in different chapters.

We may conclude our brief notice of Machiavelli with the criticism of Mr. Hallam :—

“Few political treatises can even now be read with more advantage than the Discourses of Machiavel; and in proportion as the course of civil society tends further towards democracy, and especially if it should lead to what seems the inevitable consequence of democracy, a considerable subdivision of independent states, they may acquire an additional value. The absence of all passion, the continual reference of every public measure to a distinct end, the disregard of vulgar associations with names or persons, render him, though too cold of heart for a generous reader, a sagacious and useful monitor for any one who can employ the necessary methods for correcting his theorems.”⁴

Sir Thomas More’s⁵ “*Utopia*” is the first great work written by an Englishman in the nature of an essay on

¹ Translation, p. 329.

² Discourses, l. ii. c. 20. Translation, p. 359.

³ Discourses, l. iii. c. 1. Translation, p. 377.

⁴ Hallam’s *Literature of Europe*. Part i. cap. 7.

⁵ Born 1480, beheaded 1535.

Jurisprudence. This celebrated man was successful in most of the public departments of life. His fame as a scholar was spread through Europe. He was an able lawyer, a refined courtier, an enlightened statesman, a diplomatic ambassador. He was the first layman that was made Lord Chancellor of England, who was not of noble birth, or had not previously filled some high judicial office. In his practice at the Bar he was famous for his skill in International Law.¹

But the authorship of the "*Utopia*" alone would have immortalised his name. And with reference to this work it is only to be regretted, that the extraordinary genius which in such an age could develop the principles of the "*Utopia*" was not resident in some other person than the Lord Chancellor of Henry VIII. For the extravagancies and absurdities of the "*Utopia*," and its very form, were plainly designed by him to soften the severity of his condemnation upon the then government and laws of England. If he had been some obscure scholar, instead of one of the first amongst English statesmen, the principles inculcated in the "*Utopia*" would have appeared in a scientific form, and a regular treatise upon laws and government. Some have pretended to discover in the "*Utopia*" most of the principles of laws and government in later times illustrated by Adam Smith, Sir James Mackintosh, Sir James Romilly, and Jeremy Bentham. But it is at least singular to find the Chancellor of Henry VIII. advocating the ballot, a complete form of representative government, and the reform of the barbarous Penal Code of England.

In the second book of the "*Utopia*" he describes the method of election in the imaginary republic. They take an oath before they proceed to an election that they will choose him whom they think fittest for the office. They give their voices secretly, so that it is not known for whom every one gives his suffrage. The prince is for life, unless he is removed upon suspicion of some design to enslave the people. The *Tranibors*² are newly chosen every year, but they are for the most part still continued. All their other magistrates are only annual.³

¹ Lord Campbell's *Lives of the Lord Chancellors*, vol. i. cap. 30, 31.

² Scil. Members of Parliament.

³ *De Magistratibus*, p. 86.

Sir Thomas More also clearly saw and censured the iniquitous severity of the Criminal Law of England. In the first book, Raphael Hythloday, his great traveller, who had seen Utopia, says, "One day when I was dining with him [the King of England,] there happened to be at table one of the English lawyers, who took occasion to run out in a high commendation of the severe execution of justice upon thieves, who, as he said, were then hanged so fast that there were sometimes twenty upon one gibbet. Nevertheless, it puzzled him to understand, since so few escaped, that there were yet so many thieves who were still found robbing in all places. Upon this I said with boldness there was no reason to wonder, since this way of punishing thieves was neither just in itself, nor for the public good; for, as the severity was too great, so the remedy was not effectual, simple theft not being so great a crime that it ought to cost a man his life, and no punishment, how severe soever, being able to restrain those from robbing who can find out no other means of livelihood. In this not only you, but a great part of the world, imitate ignorant and cruel schoolmasters, who are readier to flog their pupils than to teach them. There are dreadful punishments enacted against thieves, but it were much better to make such good provisions by which every man might be put in a method how to live, and so be preserved from the fatal necessity of stealing and dying for it."¹

Sir Thomas More in that intolerant age was still a warm advocate of religious toleration. The following extract is taken from the conclusion of the second book:—

"At the first constitution of their Government, Utopus having understood that before his coming among them, the old inhabitants had been engaged in great quarrels concerning religion, by which they were so broken amongst themselves, that he found it an easy thing to conquer them, since they did not unite their forces against him, but every different party in religion fought by themselves. Upon that, after he had subdued them, he made a law, so that every man might be of what religion he pleased, and might endeavour to draw others to it by the force of argument

¹ Utopia, p. 26.

and by amiable and modest ways, but without bitterness against those of other opinions, so that he ought to use no other force but that of persuasion, and was neither to mix reproaches nor violence with it; and such as did otherwise were to be condemned to banishment or slavery. This law was made by Utopus not only for preserving the public peace, which he saw suffered much by daily contentions and irreconcilable hurts in these matters, but because he thought the interests of religion itself required it."

Such was Sir Thomas More's noble views on the subject of Toleration. The "Utopia" has been by far the most successful of the works which have imagined an ideal perfect state of society and manners. The "Oceana" of Harrington, the "Civitas Solis" of Campanella, and the "New Atlantis" of Lord Bacon, have been comparatively failures. Dean Swift, in his treatises of a similar nature, has sacrificed philosophy to Satire.

§ 3.¹ Hitherto, amongst works strictly juridical, few have appeared except upon the details of the Roman Law. We have now to consider a series in which the principles of morals, justice, and polity are discussed.

The *Relectiones Theologicæ* of Franciscus a Victoria, a professor in Salamanca, were first published at Lyons in 1557. The dissertations amount to thirteen. The fifth is entitled *De Indis*, and the sixth *De Jure Belli*. He denies that the emperor, or pope, as lord of the whole world, has any power over the barbarians, Indians, or other infidels. The right of sovereignty in the King of Spain over these people he rests on such grounds as he can find, namely, the refusal of permission to trade, which he holds to be a just cause of war.²

Dominic Soto, a Spanish Dominican, published his treatise *De Justitia et Jure*, in 1588. This is characterised by Mr. Hallam as "the first original work of any reputation in ethical philosophy since the revival of letters." This laborious folio inspires us with great admiration for the author's zeal;

¹ Jurisprudence, 1550—1600.

² Hallam's *Literature of Europe*. Part i. c. 4.

but it is now forgotten. The following eulogium on Justice gives an idea of his style:—

“*Illustrissima Justitiæ virtus, fidei nostræ legitima proles, spei robur, charitatis pedissequa, cæterarumque virtutum clarissimum jubar quæcum profana, tum cum primis Divina oracula super æthera tollunt: ut pote quæ homines, civile animal, in unum congregat, ab injuriis vindicat, amore conciliat, in pace retinet, virtutibus ornat, ad æternam denique felicitatem divino munere subvehit.*”¹

Amongst the Spanish Doctors of the sixteenth century, not the least was Franciscus Suarez.² Grotius says of Suarez that he had hardly an equal, in point of acuteness, amongst philosophers and theologians; and Suarez has had the merit, even in that age, of having clearly observed the distinction between what is commonly called the Law of Nature and the conventional rules of intercourse observed between nations. He first saw, as Sir James Mackintosh has said, that International Law was composed, not only of the simple principles of justice applied to the intercourse between states, but also of those usages long observed in that intercourse by the European race, which have long since been more exactly distinguished as the Consuetudinary Law of the Christian Nations of Europe and America.³

The laborious treatise of Suarez, “*De Legibus ac Deo Legislatore*,”⁴ is divided into ten books. It is a digest of all the discussions of the Christian Fathers on the subject of justice, interspersed with numerous illustrations from Plato, Cicero, and other pagan philosophers. In the preface he says the science of Civil Right,—*Juris Civilis Prudentia*,—is nothing more than a certain application or extension of

¹ *Fratri Dominici Scti, Segoviensis, Theologi, ordinis prædicatorum, Cæsareæ Majestatis a sacris confessionibus Salmantini professoris De Justitiâ et Jure, Libri decem.* Medina, 1580.

² Born 1548, died 1617.

³ Sir J. Mackintosh's *Ethical Philosophy*, sec. 3.

⁴ “*Francisci Suarez, Granatensis Doctoris Theologi et in Conimbricensis Academiâ Sacrarum literarum Primarii professoris, Tractatus De Legibus ac Deo Legislatore in decem libros distributus.*” London, 1579.

moral philosophy to regulate and govern the political morals of the state.

In the first book he discusses the nature of Law, and analyses the divisions and definitions of former authors. Plato, in the *Timæus* and *Phædrus*, divided Law into divine, celestial, natural, and human; of which terms the second is not admitted by theologians; either because it is superfluous, or contains an erroneous doctrine. For, by the celestial law, Plato understood Fate. Now, if he understood that this law was such as not to be subject to Divine Providence, or to all things, even to men, to the extent of imposing necessity upon the peculiar operations of the soul, the opinion was false, and contrary to the Divine Government and to Free Will. But if he understood by the celestial law only what Aristotle said, — that this inferior world was united with the celestial spheres, and thence governed by natural influences and chances, which always depend from God, and change bodies, not souls, then it is not proper to make such a division; because in this sense it is comprehended under natural law. Omitting, therefore, the second term, — celestial, — the other three are in use amongst theologians, but in a sense somewhat different.¹

The Divine Law, with Plato, is governing reason existing in the mind of the Universal Deity; which law theologians also acknowledge, but call it the Eternal Law. For the law may be called divine in two ways: in one, because it is in God himself; in the other, because it is promulgated immediately by God himself. Plato used the term Divine Law according to the former sense; but the theologians, with St. Augustine, call it Eternal, to distinguish it from that law which the Deity promulgates.²

The first division of Law is into temporal and eternal; the next is into natural and positive. This second division is recognised by theologians, and the phrases *lex positiva* and *jus positivum* occur frequently amongst the Fathers. The phrase Natural Law has been used in various ways by philosophers, theologians, and jurists. Plato uses the term Natu-

¹ Lib. i. cap. 3. sec. 5.

² Lib. i. cap. 3. sec. 7.

ral Law to include every natural inclination placed in things by their Creator, by means of which they are directed to their peculiar acts and ends. So, according to the Fathers, all things which are governed by Divine Providence participate in some eternal law; whilst, according to the Institutes, natural law is common, not only to men, but also to the other animals. But the proper natural law which pertains to moral philosophy and theology is that which is inherent in the human mind to distinguish the good from the base. "Lex ergo naturalis propria, quæ ad moralem doctrinam et theologiam pertinet, est illa quæ humanæ menti insidet ad discernendum honestum a turpi."¹

In such a definition of Natural Law Suarez plainly confounds Ethics with Jurisprudence. This definition of Natural Law implies simply the Moral Sense of right and wrong. He is not correct either in his definition of Positive Law, as being so called because added to Natural Law, and not necessarily flowing from it: "Inde enim positiva dicta est, non ex illâ necessario manans."² Natural Law is now understood to be the theory of that part of our duties which is capable of being enforced; whilst Positive Law, so called as existing by position, has been shown by Savigny to arise naturally and necessarily from the internal nature of man, and the external circumstances in which he is placed.

In the seventh chapter of the first book it is maintained, and illustrated with numerous authorities, that it is the essence of a law that it be passed for the public good.

The second book is entitled "*De Lege Æternâ Naturali, ac Jure Gentium.*"

After illustrating further the doctrine that natural law is natural reason, he distinguishes it from conscience. For the law lays down a general rule about actions, but conscience gives a practical dictation in a particular case; whence, rather, it is, as it were, the application of the law to a particular occurrence.³

According to the Civil Jurists, *Jus Naturale* is distin-

¹ Lib. i. cap. 3. sec. 8, 9.

² Lib. i. cap. 3. sec. 13.

³ Lib. ii. cap. 5. sec. 15.

guished from the *Jus Gentium*, inasmuch as the former is common to man with the brutes, but the latter peculiar to man alone. After discussing the various nice distinctions of the theologians, Suarez finally adopts the definition of the *Institutes* as to the *Jus Gentium*; and lays down that the *Jus Gentium* differs in its precepts from the *Jus Civile*: because it is established not in what is written, but in custom; and not merely that of one state, but of many.¹

He then, in the following noble language, explains the reason for the Law of Nations:—

“The reason of this law is, that the human race, although divided into various nations and kingdoms, always has some unity, not only specific, but also political and moral, indicated by the natural precept of natural love and charity, which is extended to all, even strangers, of whatsoever nation they may be. Wherefore, although every state, republic, or kingdom, be in itself perfect, nevertheless, each of them is also a member of the universal human race. For these communities are never so self-consistent in themselves as not to stand in need of mutual aid, and alliance, and communication; sometimes for their amelioration and greater advantage, sometimes by moral necessity. Wherefore, they need in some manner to be rightly directed in this species of communication and alliance. And although, in a great measure, this may be done by natural reason, still not sufficiently and immediately for all: and hence special laws have been introduced by the practice of the nations themselves.”²

The remaining books are, III. *De Lege Positivâ Humanâ*; IV. *De Lege Positivâ Canonicâ*; V. *De Varietate Legum Humanarum*; VI. *De Interpretatione, Mutatione, et Cessatione Legum Humanarum*; VII. *De Lege non scriptâ, quæ Consuetudo appellatur*; VIII. *De Lege Humanâ favorabili, seu Privilegio*; IX. *De Lege Divinâ Positivâ veteri*; X. *De Lege novâ Divinâ*.

The Jesuit Mariana published the treatise *De Rege et Regis Institutione* at Toledo, in 1599. In it he discusses politics with considerable boldness; and especially in the

¹ Lib. ii. cap. 18.

² Lib. ii. cap. 19. sec. 9.

sixth chapter argues in favour of tyrannicide. This closes the series of the Spanish Jurists of the sixteenth century.

Michel de Montaigne¹ in his admirable essays, develops many correct juridical principles. Thus he denounces the French method of administering justice. "What can be more outrageous than to see a nation where by lawful custom the office of a Judge is to be bought and sold, where judgments are paid for with ready money, and where justice may be legally denied to him that has not wherewithal to pay?"² What can be more strange than to see a people obliged to obey and pay a reverence to laws they never heard of, and to be bound in all their affairs, both public and private, as marriages, donations, wills, sales, and purchases, to rules they cannot possibly know; being neither writ nor published in their own language, and of which they have of necessity to purchase both the interpretation and the use."³

However, he adopted the sceptical arguments against the intrinsic natural distinctions between right and wrong, and argues against the theory of Natural Law. But they are pleasant when, to give some certainty to the laws, they say that there are some given perpetual and immovable, which they call natural, that are imprinted in human kind by the condition of their own proper being, and of these some reckon three, some four, some more, some less. Now the only likely sign by which they can argue or infer some natural law, is the universality of approbation; yet, we should without doubt, follow with a common consent that which nature has truly ordained us. Not only every nation, but every private man would resist the force and violence that any one should do him who would tempt him to anything contrary to this law.⁴

At this time, from various reasons, the different monarchies of Europe had gradually verged towards despotism. In consequence a series of political writers appears.

¹ Born 1533, died 1592.

² This custom was introduced by the Chancellor Du Prat, under Francis I. Montaigne's Essays, book i. cap. 22.

³ *Ibid.*

⁴ Hazlitt's edition, p. 271.

Francis Hottoman published the *Franco-Gallia* in 1570. This is chiefly a collection of passages from the early French historians to prove the share of the people in the Government, and especially their right of electing the Kings of the first two races.

An anonymous treatise, "*Vindiciæ contra Tyrannos*, auctore Stephano Junio Bruto Celta, 1579," is commonly ascribed to Hubert Languet, the friend of Sir Philip Sidney.

Stephen De La Boetie, the friend of Montaigne, died in 1501; but his treatise *Le Contr'un, ou Discours de la Servitude volontaire*, was not published until 1578. He was probably the only Republican in France before the period of the First Revolution.

Balthazar Ayala, Judge-advocate to the Spanish army in the Netherlands, first reduced the practice of nations in the conduct of war to legitimate rules. His work¹ is stated to have been first published in 1582.

Albericus Gentilis published the treatise *De Legationibus* in 1583. He was an Italian Protestant, who through the influence of the Earl of Leicester was appointed Professor of Civil Law in Oxford in the year 1582. His aim in this treatise was to elevate the importance and sanctity of ambassadors by showing the practice of former times. His more important work, *De Jure Belli*, was first published at Lyons in 1589. But he still borrows his ideas of the *Jus Gentium* from the views of the Roman juriconsults.

In the first book of his work *De Jure Belli*, Gentilis defines war and treats of national belligerents as distinct from robbers and pirates; and of the causes of war as necessary in self-defence, or as otherwise just and expedient. In the second book he treats of the mode of carrying on war, of treaties during war, of the treatment of prisoners, and other matters incidental to actual hostilities. In the third book he treats of the termination of war and the restoration of peace,

¹ Balth. Ayalæ, J. C. et exercitus regii apud Belgas supremi Juridici, de Jure et Officiis bellicis et Disciplina militari, libri tres. Antw. 1597, 12mo. pp. 465. Hallam's *Literature of Europe*, part II. cap. iv.

of the rights of the nation over the conquered country ; and of changes in its political, civil, and religious institutions.

From what has been shown, therefore, of the discoveries of Suarez and Gentilis, it will be seen that Grotius has no right to be considered as the inventor of the science of International Law.

Among the political writers of the 16th century, Bodin, though now almost unknown, is confessedly the first both in the elucidation of correct principles, and the honest boldness with which he states them. Machiavelli scientifically analysed villany. Sir Thomas More was afraid to state his political opinions except under the veil of a fable. Of Bodin, Dugald Stewart has said, "I know of no political writer of the same period, whose extensive, and various, and discriminating reading appear to me to have contributed more to facilitate and guide the researches of his successors ; or whose references to ancient learning have been more frequently transcribed without acknowledgement." The Republic of Bodin was originally published in French in 1577. It was afterwards enlarged by himself and published in Latin in 1586.¹

The first chapter is entitled "Quis optimus sit Reipublicæ finis?" A state is defined to be a number of families, and of the things common amongst them, governed by supreme power and reason. And the end of government is the greatest good of every citizen.

In the second chapter he treats *De Jure familiari*.² "*Familia est plurium sub unius ac ejusdem patrisfamilias imperium subditorum, earumque rerum quæ ipsius propriæ sunt recta moderatio.*" And the family is the beginning and rudiment of the state. Bodin upholds the patriarchal authority both marital and paternal with a high hand. "The true discipline," he says, "of the father and children depends on the paternal power which either Nature or God himself hath

¹ Joan. Bodini Andegavensis *De Republicâ libri sex Latine ab auctore redditî, multo quam antea locupletiores, cum indice copiosissimo.* Frankfort, 1591. The Republic was translated by Knolles.

² *De Republicâ*, p. 11.

given to every one over his children. The word power is common to all who have either publicly or privately the right of government. 'A prince,' says Seneca, 'has power over his subjects; a magistrate over citizens; a father over children; a schoolmaster over scholars; a general over soldiers; a master over slaves.' But out of all these, the right of government has been given by Nature to none except to the father."¹

In the fifth is discussed the question, "*An servitia ferenda sint in republicâ bene constitutâ?*" This is illustrated with much learning; but he comes to no very exact conclusion. "In whatever places slaves may exist, they ought not to be manumitted at once and together; but this must be done by degrees, and a commencement must be made with those who have learned in mature age some art by which they can support themselves. Otherwise they must perish, as befell those whom the Emperor Charles V. commanded to be manumitted at once in Spain. In the conclusion of the chapter, Bodin says that if it be true there is always room for the Divine Law, and that it is not confined within the boundaries of Palestine, why should not that law, so usefully and wisely promulgated by God, concerning slavery and liberty, prevail rather than the laws excogitated by the minds of men."²

The sixth chapter discusses the citizen. "*Est autem civis nihil aliud quam liber homo, qui summæ alterius potestati obligatur.*"³ For before any citizen or form of state existed, every father of a family had supreme power of life and death over his children and wife. But after that violence, and ambition, and avarice, and revenge, had supplied them with arms against one another, the issues of wars made the conquerors enslave the conquered. And he who had fought bravely as a general, governed not only his family, but also his enemies, as well as his companions; but the latter as friends, the former as slaves. Then that full and complete liberty given by nature to every man, to live as he pleased, was altogether taken from the vanquished, and even lessened to the conquerors, by him whom they had chosen as their

¹ Cap. iv. p. 11.² Cap. v. p. 71.³ Cap. vi. p. 71.

leader; because it was necessary for each man, in private, to acknowledge the supreme authority of another. Hence was the first origin of slavery and subjects, of citizens and strangers, of prince and tyrant. To this conclusion reason itself conducts us, that empires and commonwealths were first united by force, even if we were deserted by history.¹

The second book treats of the different species of government in a state. These are Monarchy, Aristocracy, and Democracy. "*Rex est qui in summâ potestate constitutus naturæ legibus non minus obsequentem se præbet, quam sibi subditos quorum libertatem ac rerum dominium æque ac sua tuetur fore confidit.*"² This definition is defective, in making no distinction between monarchy and tyranny, inasmuch as Bodin thus places no restraint upon the will of the Prince. "*Aristocratia Reipublicæ forma quædam est in quâ minor pars civium in universos ac singulos cives summæ potestatis jus habet.*"³ This definition is also erroneous. It arises from the principle of the division of labour, that a small number of the citizens must exercise the functions of the government. But perhaps Bodin intended to define that state in which the majority were without political rights. "*Respublica popularis est, in quâ cives universi, aut maxima pars civium, cæteris omnibus non tantum singulatim, sed etiam simul coacervatis et collectis, imperandi jus habent.*"⁴

The third book is principally on councils of state and magistrates. The first chapter of the fourth book is entitled "*De Ortu, Incremento, Statu, Conversione, Inclinatione, Occasu Rerum Publicarum.*" A revolution ensues when the form of polity is changed; but this ensues when the popular power is transferred to one, or the power of the law to all citizens. The power of the people goes to the aristocracy either when the strength of the commonwealth has been crushed by enemies, or on the slaughter of a great army of citizens; but, on the other hand, the popular power receives a great increase when victory has been obtained.⁵

¹ Cap. vi. p. 72.

² Lib. ii. cap. iii. p. 312

³ Lib. ii. cap. vi. p. 349.

⁴ Lib. ii. cap. vii. p. 369.

⁵ P. 602.

Often, however, the popular power changes into monarchy ; and this most frequently from civil sedition, or if unbounded authority be given to the supreme magistrate. Cicero says, “ *Ex victoria cum multa, tum certe tyrannis existit.*” On the other hand, tyrannies frequently end in popular states ; because the people who cannot endure moderation, when the tyrant is once removed, desiring to communicate supreme power to all, pursue all the friends of the tyrant with such hatred as to desire to leave not one. Hence are the destructions, exiles, proscriptions of the nobles.¹

But aristocratic states cannot be changed into popular without external or domestic violence. However, the popular authority is often transferred quietly to the nobles. And this happens in two ways : either when humble rustics, workmen, or merchants, intent on their domestic affairs, spontaneously abandon public business ; or when the number of citizens having been diminished by pestilence or war, the number of strangers to whom residence is permitted without the right of suffrage or government is increased.²

But this is most to be feared in an aristocratic government when the plebeians are excluded from all honours and offices ; which, although it is difficult to bear with content, still must be borne if the reins of power be given to the best ; but when they are given to wicked and unworthy men, each one the boldest will seduce, on opportunity, the people from the aristocracy ; and this the more easily the less the aristocracy are unanimous amongst themselves, which is dangerous to all states, but mostly to an aristocracy.³

The second chapter of the fourth book, *An Rerumpublicarum Conversiones prospici possint*, is merely full of absurd astrology and geometrical calculations, partly based upon certain unintelligible passages in Plato.

In the first chapter of the fifth book he discusses the adaptation of government to the varieties of race and climate. Montesquieu is commonly supposed to have borrowed largely from this. He recommends a periodical census of property.⁴

The last chapter is entitled “*De Tribus Justitiæ Generibus*”

¹ P. 604.² P. 610.³ P. 612.⁴ Lib. vi. c. 1.

Proportione geometricâ, arithmeticâ, et harmonicâ. Constitutis," and is overlaid with much abstruse learning. This great work of Bodin is now comparatively unknown ; but " no former writer on political philosophy had been either so comprehensive in his scheme, or so copious in his knowledge, none, perhaps, more original, more independent and fearless in his inquiries."

ART. VIII. — LAW REFORMS OF THE NEXT SESSION.

[WE have been favoured with permission to print the following extract of a letter to Lord Denman from Lord Brougham :—]

" BUT, from the disappointments of the Session 1851, admitting that they were in a great degree compensated by the important change in the Law of Evidence, and by the foundations laid for further improvement both in Chancery and Common Law, I gladly turn to the superstructure which, in the Session just ended, has been raised, and will still further be raised next Session, upon those foundations.

" The Patent Law Amendment Bill of 1851, compounded of the one I presented and the one grafted upon it by the late Government, was prevented, by the prorogation a year ago, from passing the Lords, after it had been sent back from the Commons, with great alterations. Reintroduced this last Session, it underwent other alterations, and has at length passed. I certainly do not think it has been the better for these changes, yet, in some material particulars, it undoubtedly is an amendment of the former Law, and so it will be found when worked. The Copyhold Bill is a great improvement, and sanctions, for the first time, the principle of compulsory enfranchisement, which was defeated in the Lords, whose select committee rejected my Bill of 1841.

Eleven years have thus been lost, to the great injury of land-owners; the landlord not having gained, but rather lost, by the delay, which has fallen heavily on the tenant. But I hasten to the most important measure of the Session.

“ In my letter to you a year ago, I stated the opinion which much discussion for some years in the Profession and the recent inquiries of the House of Lords’ Committee had made universally prevalent, that a great change in the Chancery Procedure was absolutely necessary; that the Master’s Office must be abolished; and the Equity Judges work out their own decrees, sitting in chambers (as the Common Law Judges do), to dispose of such matters as cannot be conveniently dealt with in court. The Chancery Commissioners came unanimously to the same conclusion some time after, but without any previous communication with the Lords’ Committee, except in so far as we had the benefit of their able and excellent chairman, the M. R.’s, evidence upon the subject. We must here pause for a while upon the history of this most important measure; not so much that justice may be done to those whom we have to thank for it, because this does not seem to have been withheld from them, but in order to draw a useful and most practical lesson upon the evils of needless delay in effecting improvements of our Legal System. It is certain that the late Government had resolved to carry the measure, and that a Bill, founded upon the Commissioners’ Report was in preparation when they somewhat unaccountably resigned. Their Chancellor occasioned considerable doubt as to his own share in this good work by an incorrect and careless statement of his case; — an inaccuracy which he hardly ever, a want of zeal which he certainly never, showed in the case of any other person. But the fact of his having ultimately adopted the Report, and joined in giving effect to it, is undeniable. It was proved in detail by Sir W. Page Wood, when the matter came before the House of Commons. One therefore hardly knows whether more gratitude is due to them or to their successors for the invaluable improvement which has been carried; — of great importance, if it be all we are to obtain, but of still greater in what must inevitably follow from it, — the examination of

witnesses orally and in the Judges' presence, and generally the fusion of Law and Equity.

“ But while we render justice to those, first the Commissioners, next the Government, who have made this great step in legal improvement, only let us consider for a moment how long and how needlessly it has been delayed. The inquiry instituted by Lord Lyndhurst in 1841, was given in evidence before the Lords' Committee ten years after; and then it appeared that this very measure had been described in detail to the late M. R. and the others who were directed to consider of the best remedies for the evils so loudly and so generally complained of. Master Brougham's letter of 24th February, 1842, is in evidence; it contains the whole plan, states broadly that no other remedy can possibly prove effectual, and only differs from the proposal of the Commissioners ten years later, in assuming the necessity of making more Judges — an error, if it be one, in which I shared, though I now incline to think that there will be no such necessity, unless the new system should occasion, as for the benefit of the suitor we should hope that it may, a very considerable increase of business in the Courts of Equity. Then how vexatious to reflect, that ten years have been thrown away, when all might easily have been done in 1842 which has with no little difficulty been accomplished this year! My brother spoke from eleven years' experience in the Master's Office, and after consulting with colleagues of still longer standing. Lord Langdale, one of the most enlightened and zealous, but also judicious and circumspect Law Reformers, entirely approved of the proposal, and declared his perfect willingness to bear his part in the execution of it by working out his decrees, taking chamber business. I know that the V. C. Shadwell, Sir J. Wigram, then also a Vice-Chancellor, and, I have reason to believe, Mr. Pemberton Leigh, a most able and experienced practitioner, agreed. It is plain, from the evidence both before the Lords' Committee and the Chancery Commission, that nothing whatever was stated to either body in 1851, which had not been pressed upon the private committee of Lord Lyndhurst ten years earlier, and in the selfsame terms. Yet, when in

1849, I brought in, and indeed, carried through the Lords, the far less effectual measure, the Judges Masters Bill, only propounded by Master Brougham, in his letter and pamphlet, as fit to be entertained, should it be found impossible to carry the other, the true remedy, I was strenuously opposed by Lord Cottenham ; who, with merits of the highest order as a judge, laboured under the prejudice so fatal to him as a law-giver, of believing everything perfect to which he had been accustomed in the Court of Chancery. He all but prevented the Bill from passing the Lords, and secured for it such a reception in the Commons, that we abandoned it in despair. If we are bound to profit by observing this remarkable instance afforded by the Chancery Bill, to illustrate the evils of delay in effecting necessary improvements, we may, perhaps, also draw from its history another lesson ; not, indeed, to make us less cautious in preparing plans, or more hasty in executing them, but to show how the most effectual measure may oftentimes meet with no greater obstacle to its adoption than the half measure.

“ While both Houses were so usefully occupied in effecting this important change, it became the friends of Law Amendment to abstain from bringing forward any proposition which might interrupt them or distract their attention ; and accordingly, nothing was pressed which could create controversy in proceeding with the County Courts Bill. I consented to withdraw the Equity clauses, and it passed, effecting some considerable though still very inadequate improvement in these Courts. But one provision is of material importance. The repeal of the prohibition against barristers there taking briefs from clients, on which, this year and the last, we had both been defeated, was restored by the Commons, and the Lords withdrew their objection. Thus, in the inferior but most frequented Courts, as it has always been in the superior Courts, the regulation of this matter is now left to professional etiquette instead of statutory prohibition ; and the barrister can always protect himself against undue attempts to exclude him from practice.

“ The Chancery Bills and the Common Law Bill, (from which my expectations are less sanguine by a good deal than

yours, very valuable as is a considerable portion of it,) were only passed at the close of the Session, and we were therefore unable to proceed with any other measures. But on the eve of the prorogation I strongly pressed upon the Government the subject so often brought before Parliament, of the Criminal Law Digest, all but completed about two years ago (twice indeed made part of Bills that passed through their first stages), and of the County Courts, as well in themselves as in their connection with the Supreme Judicature. The Government gave the most positive assurances that both these important subjects should command their best attention.

“As to the Digest, there can be, and I really believe there will be, no further delay after all that has passed. The whole of the first branch, Crimes and Punishments, has been fully examined by one commission, after being diligently prepared by another. There can, therefore, be no difficulty in now passing this branch. The second, that of Procedure, alone needs revision; and although I recommended that the Commission should be renewed, and beside revising the Procedure Digest, should assist the Government in passing the other, yet the reasons appear to be satisfactory which Mr. B. Ker, agreeing, as I believe, with his brother Commissioners, assigns for dispensing with the Commission, at least until the Procedure Digest is to be passed, the Secretary alone being sufficient to aid the law officers in passing the first Digest. But a very judicious suggestion proceeded from the same quarter, and was at once acceded to both by Lord Lyndhurst and myself. It was to take one great division or chapter of the first Digest (for example, Offences against the Person), and begin by passing this, together of course with the General or Preliminary chapter applicable to all offences. The whole might be thus successively passed, and the Digest of Procedure taken afterwards, first undergoing a revision. Upon looking at the first Digest (Crimes and Punishments), which you will find in my two Bills of 1843 and 1844, you will observe that though the provisions are all carefully classed under the several heads in distinct chapters, yet the numbers of the articles run through the whole in one series, as in the French

Codes ; an arrangement of great practical convenience, and suggested by Sir T. F. Lewis and Mr. C. W. Wynne, warm friends of the Digest. If, as I hope and trust, the Government shall adopt the plan of passing it by chapters, each forming a single Act, it will be necessary, after the whole Digest is enacted, to put it in the form of one statute, and then the articles can be numbered consecutively.

“ In passing this law, it will be most essential to have it distinctly understood, that its provisions are not in any wise under discussion, excepting for the purpose of digesting ; that is, of seeing that they give correctly the Law as it now stands. The work would be absolutely endless if any question were to arise on the alteration of the existing Law. No doubt one benefit, and a most important benefit, to be derived from having a Code is its manifest tendency to promote the Amendment of the Laws, by bringing into view their defects and their incongruities, and by the facilities which it affords of making the requisite amendment with safety, because with full circumspection, and an accurate view of the relations which each part, both of the existing and of the proposed law, has with all the rest. But the work of framing the Digest must first be performed ; it must be prepared apart from any consideration of the changes which may be suggested in the act of digesting. — A great work of legislation will be accomplished, when we shall have enacted the Digest of our Criminal Law. But it must lead to a yet greater — the Digest also of the whole remaining portions of our laws. We should begin with digesting the Statute Law alone ; and that once done, the residue of our Code will be added by digesting also the Common Law, and incorporating this with the former Digest.

“ The other subject urged upon the Government, and which, I also trust, is now under consideration, is the issuing of a Commission to inquire into the improvements which experience has shown to be wanted in the County Court Judicatures, and also in the other parts of our Judicial system, as connected with them. The absolute necessity of this revision is manifest, whether we regard the manner in which the Local Courts were established, or the vast extent

of the business which they transact. The provisions of the original Bills of 1830, 1831, and 1833, were not enacted till after thirteen years had elapsed; and then by piecemeal, in four several Statutes, 1846, 1849, 1850, and 1852, while some very important branches of the original measure still remain to be added. Many oversights have unavoidably been committed, some inconsistent provisions introduced, with some which experience has shown to be objectionable; and the same experience has also suggested both additions to the former enactments and improvements of them. Everything relating to the finance of the subject requires full examination; above all, the wholly unjustifiable course unfortunately pursued of raising, by fees upon the suitor, the sums wanted to defray the expense of the Courts — expenses which it is the bounden duty of the State to provide in all cases, but if in any more especially than in all others, in the cases of persons litigating on interests of a moderate amount. The transfer of the Country Bankruptcy Jurisdiction, and the manner of uniting it with that of the County Courts, which already have Jurisdiction of Insolvency, also requires careful examination, unless it should be thought fit to proceed at once with the Bills presented to the Lords in the two last Sessions. These were very carefully prepared; and with the aid of the most experienced officers and practitioners in the Bankruptcy Courts, as well as the County Courts. But I always stated that they must be taken charge of by the Government, and that further inquiry would be expedient respecting their details. The matters of finance connected with this transfer peculiarly require the Government to undertake it.

“The experience of the County Courts is fitted to throw light upon the question, how far Jury Trial should still be retained in all cases, and against the desire of the parties, — a question well deserving to be examined by the proposed Commission. The Bill which I had prepared last year proceeded upon the proof afforded by those Courts, that in the vast majority of cases both parties preferred trying without a jury, and superseded the necessity of having one where neither party wished it, in all actions of debt and contract; but this whole subject, from its great importance in a constitutional

view as well as in its connexion with our Judicial system, is deserving of a full investigation.

“ But the procedure of the Supreme Courts, and especially what relates to the circuits of the Judges, must form another subject of inquiry, connected with the new system of Local Judicature. A new arrangement of these circuits, much considered some years ago, and then, as you are aware, only prevented by an accident, is not the only change *now* required. More frequent circuits, always necessary, are now become easy from the diminution of business in the Supreme Courts; and though this might be effected without the intervention of Parliament, yet it cannot be attempted without a full inquiry.

“ If I am told, as I was the other day when broaching the subject of a Commission, that we have not yet had long enough experience of the County Courts to justify it; my answer is, that the experience of five or six years has been of sixty Courts, all except six multiplied by the circuits of their Judges. The other fifty-four are holden twelve times a year, and on an average in nine places; so that, supposing only five years (there have since March 1847 been nearly five years and a half), upwards of 29,000 Courts have been holden, and by sixty different sets of judges, many more sets of officers, still more of practitioners and parties. It may safely be said, that hardly any thing can remain to be suggested which has not in some or other of those numerous sittings, in such various matters, to some or other of those numberless persons, been presented by the actual working of the system.

“ There cannot be a doubt, that the great measure of consolidating and amending the whole law relating to Local Judicature can best be prepared by a Commission, of which the late Chancery Commission offers the best model, both as to its instructions and its composition, — a combination of lawyers from both sides of the Hall, with an infusion of unprofessional men. But there is another and a very important reason for this course of proceeding. The experience of the Chancery Commission shows how mightily it facilitates the passing of the measures which may arise out of the report. You and

I must candidly admit that, inestimable as have been the benefits resulting from our Reform of 1831 and 1832,—a measure which neither of us can feel in the least degree averse to improving by all safe and practical extension of its provisions, and thereby giving a still better lesson than we even now do to the enemies of popular government,—yet something of the same difficulty is experienced in conducting parliamentary business, which, existing elsewhere in an incomparably larger measure, and with far less means of counter-acting than our long practice has given us, makes men find or fancy themselves unfit for constitutional freedom. Without stopping to inquire how this difficulty may be met in the general, I am sure we may gather from the proceedings of last Session upon the Chancery Bills how vast a facility is afforded to legislation upon the technical matters of Jurisprudence and Judicature, by the previous labours and subsequent co-operation of a well-chosen Commission.

“ There are other measures which must be proceeded with, and which do not, like those I have mentioned, require the intervention of the Government. Some important amendments are still wanted in the Law of Evidence — *declaratory* provisions to make the rule both clear and uniform, as to the party discrediting his own witness — as to cross-examining without, or rather before, producing the written document (what we used to call the Rule in the Queen's case) — as to impeaching a witness's credit by collateral matter — as to comparison of hand-writing — *enacting* provisions on some yet more important points — as the costs of persons tried and acquitted — the giving prosecutors the option of changing the venue, subject to the Court's discretion, and with due security for the attendance and expenses of the defendant's witnesses — above all, the limitation of the rule protecting witnesses from self-crimination, but making their depositions inadmissible in evidence against themselves. In all these measures, however, we are met at every step by that grand defect in our Criminal Law, the want of a Public Prosecutor. Who that reflects for a moment on this subject, but still more, who that reads the dicta of the learned Judges (cited by me from the Reports, the last day of the Session), in which

they most vehemently, but most justly, complain of being driven to perform the work of the prosecutor, while the humane fiction of the law represents them as the prisoner's counsel; nay, who that is aware of the frequent escape of malefactors—to say nothing of the occasional suffering of the innocent from the defects in our preliminary proceedings—can hesitate in pronouncing that this glaring defect in our jurisprudence—a defect confined to this country, or rather to two of the three kingdoms, and our foreign settlements—must at length be supplied?

“It is impossible to speak of the Law of Evidence, and not look back with thankfulness to the inestimable benefits of the great change made last year, and about to be accomplished when I addressed you at the close of the Session; still feeling some anxiety as to its fate, from the pertinacity with which we were opposed in a high official quarter. This most important alteration in our judicial procedure, has fully answered, if it has not surpassed, our most sanguine expectations, in all respects save one. I had certainly looked forward to its operation in deterring men from acts of bribery at elections, because it gave the means of detection by examining all the parties; and one might fairly reckon upon evil-doers being deterred when they knew the risk to which they now exposed themselves. I still trust much to its efficacy as soon as the knowledge of its stringent provisions shall have been practically diffused, and taught by examples made under its salutary operation. But hitherto it should seem that men have not as yet become sufficiently aware of it, and of the risks they now run; or, possibly, that trusting to their agents, they hope to escape themselves; and we ought unquestionably to take further measures for putting down this crying vice of our times. I feel disposed to pursue the course which proved successful forty years ago with the Slave Traffic. The eager pursuit of enormous gain in that execrable crime, falsely called a trade, disarmed mere pecuniary penalties of all terror in the eyes of the offenders. But when my Bill of 1811 made it felony, no calculation of profit or loss could reconcile men to the hazard of being not only branded with infamy—for to that they might have been callous—but of.

being transported as convicts; and the traffic ceased to be carried on by British subjects. Why should we not try if they whom the vehement desire of obtaining seats in Parliament induces to run the risk of penal actions, or of losing the prize they are in quest of, by being unseated on petition, will venture to corrupt voters when, on detection, they may be sent to the tread-mill? I question also if their agents would expose themselves to this hazard; and assuredly the new Law of Evidence will enable us to reach the agent even when it may fail in securing the detection of the principal.

“But except in this one particular the success of that Act has proved most complete. The Judges, even those who were most averse to it, now bear the clearest and strongest testimony in its favour. It has certainly both acted universally and powerfully in enabling Courts to arrive at the truth, and it has been as efficacious in preventing unjust suits and dishonest defences. Certainly to encourage all rightful litigation, and check the wrongful; opening wide the doors of our Courts to the honest suitor, and as far as possible to him alone; and favouring only the resistance to unjust demands,—must ever be the great object of the lawgiver, but never can he attain it until he completes the substitution of natural for technical procedure. Those kindred measures admitting the evidence of parties, and establishing local judicatures, have been the nearest approach to the accomplishment of this. And how prodigious is the good thus effected, the misery prevented! How many instances does the comparatively narrow experience of each of us in the profession afford us, of persons driven to ruin and despair by the denial of their just claims through the law’s delay and cost, or the enforcement of them at enormous sacrifice, and after a lifetime of anxiety and vexation!

“The benefits of these new laws must surely now be extended to Scotland. The late Government brought in a Bill to amend the Law of Evidence in some important particulars; and we only passed it in the Lords upon the understanding, clearly expressed, that it should as soon as possible be enlarged, so as to embrace the most important change of all, the Evidence of Parties. The benefits of the County Courts

too cannot be withheld from that part of the kingdom. Formerly the Scotch system was regarded by England with envy, because of the Sheriff's jurisdiction. The far more cheap and expeditious procedure of our County Courts has now reversed this feeling, and transferred the envy to Scotland. Surely the two countries should be placed on the same footing in this important particular by giving to the Scotch Local Courts the same jurisdiction which is vested in the County Courts of England. From Scotland we may in return borrow, beside the Public Prosecutor, that most salutary proceeding, the Declaratory Action, my Bill for introducing which, in 1845, was dropt because it met with no kind of support, although every Chancellor, from the time of Lord Hardwicke, had successively expressed strong opinions in favour of the plan. Its tendency is direct and powerful to quiet possession, to further the arriving at truth by timely inquiry, and to lessen the number of vexatious and litigious proceedings.

“ But I must once more entreat your attention, and that of all Law Reformers, to by far the most essential of the measures for preventing undue and unnecessary litigation,—a measure, too, intimately connected with the great improvements of which I have been speaking,—I mean the encouragement of Arbitration, and vesting in the local judge the functions of a Court of Reconciliation. This system has been again and again recommended by the experience of other countries; but why go abroad for proof of the blessed results which it must necessarily have? Surely no one can doubt that if the parties in every case were to come unattended by any professional man, before a Judge, and hear his opinion upon their several contentions, a vast proportion of groundless claims and groundless defences must be immediately stopt with hardly any expense incurred, and those causes only come to trial in which, whether on matter of law or of fact, there was a real ground of dispute, a matter that ought to be tried. When this consummation shall crown the efforts of our statesmen and lawyers, they may truly enjoy that most delightful of all gratifications, the consciousness that they have really promoted the happiness of their fellow

creatures. Far be it from me to undervalue the merit and the enjoyments of individual or private beneficence. But all feel, and with great unhappiness, how limited is the power of each of us in this direction, and how we are exposed to deception, and to mistake, even in the little we can do. Some, as you are aware, who even make it a rule to consider each day as lost that has not seen an act of kindness, keeping with themselves an account of this description, are continually undergoing the misery of limited resources to meet demands that have no limits whatever, and not seldom find that their benevolence has been misdirected. But they who by general measures of a wise policy, defeat injustice, disarm oppression, restore lost rights, and protect threatened possession; who save humble men from the wiles of the crafty, rescue thoughtless men from their own improvidence; — they have the unspeakable comfort of knowing that their means of doing good are commensurate with their wishes, that their exertions can never be wasted on the undeserving, that their benevolence can never be otherwise than beneficent, and that the “quality of their mercy” is of the very highest order, preventive of ill, not remedial, and leaving far less distress to relieve. When all men in high station and of great power shall have their minds well impressed with this principle, we shall see the record of their public labours altogether eclipse that of their private charities.”¹

“Brougham, 16th August, 1852.”

ART. IX.—SEPARATION OF DUTIES OF THE GREAT SEAL.

AT the present period when Law Reforms, even of an extensive character, are not only favourably received but taken into careful consideration, it is important to keep in view a subject which we have repeatedly² brought before our readers

¹ As to the other proposed reforms, see Postscript.

² See 2 L. R. 245.; 8 L. R. 122. &c.

— that of the appointment of a Minister of Justice, in other words, the establishment of a department in the State whose express business should be to attend to all matters connected with the administration of justice. We have already seen¹ what importance was attached to a reform of this kind by Lord Langdale, and we think it will be useful to lay before our readers his views on the present duties of the Great Seal at greater length; but it has escaped attention that Lord John Russell, the leader of Her Majesty's Opposition, has also expressed a strong opinion as to the necessity for a separation of those duties, being almost the only opinion on any great law reform question which we think his lordship has ever pronounced.

Let us then first give Lord Langdale's views, which, as we have already seen, he continued to hold and express almost down to the day of his death. These were contained in a paper given to Lord Melbourne, when Prime Minister, for the use of his cabinet.

“ The judicial functions of the Chancellor are partly of original and partly of appellate jurisdiction. His political functions are not merely ministerial but include the exercise of very extensive patronage unconnected with the duties of the office.

“ The following statement, though incomplete, is perhaps sufficient for the purpose now in view :—

“ *Ministerial.*

“ The Chancellor is,

“ 1. The King's principal adviser in matters of law, a Privy Councillor, a Cabinet Minister, and great Officer of State, responsible in all matters, political and ministerial, which are connected with the custody and use of the Great Seal.

“ 2. Speaker of the House of Lords in its political and legislative capacity.

“ *Political.*

“ 3. Patron of the King's livings under the value of twenty pounds a year in the King's books.

¹ See *antè*, pp. 36. 38.

" Distributive.

" 4. Appointer and mover of all Justices of the Peace.

" Appellate.

" 5. Judge of Appeals, as speaker or prolocutor of the House of Lords, in its judicial capacity, the Supreme Court of Appeal for the United Kingdom.

" 6. Judge in Chancery, rehearing the Decrees and Orders of the Master of the Rolls and Vice-Chancellor.

" Judicial.

" 7. Judge by the Common Law of various matters arising in the Petty Bag Office, or relating to the issuing and superseding of certain writs.

" 8. Judge by prescription of matters determinable by the Court of Chancery as a Court of Equity, including the care of infant wards of Court.

" Original.

" 9. Judge in matters of bankruptcy and various other matters, especially attributed to him by various Acts of Parliament.

" 10. Visitor of charities founded by the Crown, or as to which there is no special visitor, and the heir of the founder cannot be discovered.

" 11. Guardian or superintendent of idiots and lunatics and their estates by special commission from the Crown.

" It is evident that no man can perform all the duties attached to the office above enumerated in a manner satisfactory to himself and to the public. The extent, variety, and importance of the business to be transacted is more than sufficient to distract and overpower the most vigorous attention if attempted to be constantly applied.

" And not only is the quantity of business more than one man can properly master, but some of the functions which the Chancellor is called upon to perform are incompatible with one another, and unfit to be performed by the same man.

" The mind of a Judge ought to be in a state of the greatest possible calm and tranquillity; his cool and undisturbed attention should always be given to the case before him, and he should by no means be peculiarly liable to be agitated by political storms, or

to be assailed by the importunities and solicitations which will inevitably crowd upon the possessor of great patronage. Neither ought the suitors to be subjected to the great expense and inconvenience which is often produced by the change of their Judge with the change of an administration.

“ Experience has, indeed, sufficiently proved the great inconvenience arising from the union of the political and judicial functions of the Chancellor, and has sufficiently shown the benefits which would probably arise from a separation of them.

“ But further, the judicial functions which the Chancellor is required to perform are incompatible with one another.

“ The due administration of justice makes it necessary that the decisions of every Judge of original jurisdiction should be subject to reconsideration, not only upon a rehearing before the same Judge, but also upon an appeal to another Judge or Court.

“ In the matter of appeals and rehearings the Chancellor is in a very anomalous situation. Strictly speaking, he is not a Judge of Appeal from the decisions of the Master of the Rolls and Vice-Chancellor, but he has a right to rehear the cases in which either of them has made a decree or order, and, under the circumstances which happen, the rehearing is in most cases substantially an appeal, and, if not an appeal, it becomes, by the production of fresh evidence, substantially an original hearing. Strictly speaking, again, the Chancellor, if a peer, is no more than any other peer or Judge of Appeal in the House of Lords. The appellate jurisdiction is vested in the House, and every peer has his voice and vote. But (if we except what is now passing) the other peers will not attend, and in practice the appellate jurisdiction is exercised by, and is substantially vested, in the Chancellor alone.

“ Thus there have been in effect two successive appeals, one from the Master of the Rolls, or the Vice-Chancellor, to the Lord Chancellor in the Court of Chancery, and the other from the Lord Chancellor in the Court of Chancery to the Lord Chancellor in the House of Lords.

“ A double appeal (being more than is requisite to secure the due and safe administration of justice) produces unnecessary litigation, expense, and delay, and an appeal from the Chancellor to himself is a mockery. There are cases in which the Chancellor, in the name of the House of Lords, has reversed his own decisions; but this he might do in his own name upon a rehearing in his own Court, without the forms, the delays, and expenses of a pretended appeal to another Court. From these observations it would appear

that the office held by the Chancellor would admit of advantageous separation into three classes :—

- “ 1. The appellate judicial offices.
- “ 2. The original judicial or quasi judicial offices.
- “ 3. The political offices.

“ With a view to the foregoing objects it would seem expedient,

“ 1. To take away from the Chancellor all judicial power, leaving him (of his present duties) those which are indicated by the numbers 1, 2, 3, and 4. in the table.

“ 2. To give to the Chancellor all such (if any) additional power as might be required to enable him to perform the duties which are implied by the functions indicated at No. 3. in the table.

“ *Note 1.* The performance of the duties of the Chancellor or Keeper of the Great Seal, after his office was thus altered, would require a lawyer of the first abilities and character. He would be the King's principal adviser in matters of law; the Minister responsible in all matters connected with the custody or use of the Great Seal; the centre of all information respecting the state of the law, the judicial establishment, and the expenses and revenues of the Court of Justice. He might be responsible for all judicial appointments. He would have to conduct or direct all such inquiries as during late years have been conducted by separate legal Commissioners. On all subjects connected with his office he would have to make annual reports to Parliament, and to answer occasional inquiries. He would have to peruse and report upon all bills proposing to declare or vary the state of the law on particular subjects, and to point out the mutual dependence or the inconsistencies, the policy or impolicy, of schemes from time to time suggested. The greatest part of his functions (though none of them judicial) would be more or less connected with the administration of the law; and all of them would be of vast importance. The possession of the office would be the highest political eminence which a lawyer could obtain, and the general welfare requires that this highest eminence should not be both political and judicial.

“ *Note 2.* It might tend to reconcile the lawyers, and perhaps to diminish some considerable opposition, if it could be held out that the office of Chancellor thus modified might be hereafter consolidated with some other considerable office, such as that of President of the Council.

“ 3. To appoint a new Equity Judge (say a Lord Chief Justice

of the Court of Chancery), to attribute to him all the functions indicated at Nos. 7, 8, 9, 10, and 11. in the table.

“ *Note 1.* The transfer of the Equity business of the Exchequer¹ is not a necessary part of this proposal; for, considering how many persons there now are who are induced to incur great hazard and loss, and submit to compromises involving great injustice, rather than expose themselves to the delays and expense of a chancery suit, it is certain that if causes could be more speedily heard, there would be many more *bonâ fide* causes than there now are; and although the *malâ fide* causes would be diminished, there are strong reasons for thinking that the business on the whole would be much increased, and that after the appointment of an additional judge it would not be very long before the judicial power of the Court of Chancery would again be found deficient. But it is certainly desirable to unite the different Courts of Equity under one system; and the occasion of appointing an additional Equity Judge seems a favourable one for accomplishing that useful purpose.

“ *Note 3.* The rank of the proposed Judge would have to be considered. It being proposed to transfer to him several duties which have heretofore been performed by the Chancellor, it is apprehended that considerable dissatisfaction would be occasioned if his rank was not high. The proper place would seem to be either immediately above, or immediately below, the Chief Justice of the King's Bench.

“ 4. To make a satisfactory arrangement for the proper hearing of appeals, and providing for the disposal of all appellate judicial business, including not only that which is now nominally disposed of by the House of Lords, but also that which is disposed of by the Judicial Committee of the Privy Council, by the Lord Chancellor, in his own Court, and by the Chancellor of the Duchy of Lancaster.

“ The importance and great want of such an arrangement cannot be doubted; but there will be great difficulty in accomplishing it.

“ The House of Lords, as a body, is manifestly unfit for the work, and yet would probably be unwilling to part with the jurisdiction. At the same time it must be admitted that the Chief Judge of Appeal (hitherto in substance the Chancellor alone) has

¹ This paper contained a suggestion for the transfer to the Court of Chancery of the Equity business of the Court of Exchequer, which has been already effected.

possessed a much more imposing dignity, in consequence of his speaking in the name of the House of Lords; and it cannot be desired to do anything which the Peers might reasonably think disrespectful to them, or derogatory to their authority. The circumstances are embarrassing, and it is probable that several plans may be thought of and rejected before the most convenient and eligible is selected.

“ It seems obvious that a steady and effective Court of Appeal cannot be secured by relying on *ex-Chancellors*, or on the occasional assistance of Judges who have other duties to perform; and, presuming that the Supreme Court of Appeal ought to remain either in, or intimately connected with, the House of Lords, it would seem to be necessary, — 1st. To appoint a Lord Chief Judge of Appeals in the House of Lords. 2nd. To assign to him, or to him and his co-judges or assessors, a court or chamber contiguous to the House of Lords. 3rd. To enable the Judge or Judges of Appeal to sit, and hear, and determine appeals, not only during the Sessions of Parliament, but during the ordinary judicial year, whether the Parliament be sitting or not, and even in the intervals between the dissolution of one Parliament and the meeting of another; and it would seem to be expedient, — 4th. To leave all Peers at liberty to sit in the Court of Appeal, and together with the Judge or Judges of Appeal; to make the decision of the Judge or Judges of Appeal final and conclusive, whether other peers are there or not.

“ Obviously the course of justice ought not to be impeded, or in any way affected by the political reasons which determine the Sessions or the dissolution of Parliament. But supposing it to be agreed that a Lord Chief Judge of Appeals in the House of Lords should be appointed, and that a Court of Appeal should sit during the ordinary judicial year, there will still be considerable difference of opinion respecting the constitution of the Court, and the assistance which the Chief Judge should receive.

“ 1. The Judge might be left to such attendance of other peers, and such right of calling for the opinions and advice of the Judges (who are summoned as members of the King's Council in the House of Lords) as the Chancellor, sitting in the House of Lords, has heretofore been accustomed to; this would, in practice, concentrate the whole responsibility in the Judge of Appeals, and be by far the simplest, as well as the cheapest, and perhaps on the whole the best plan.

“ 2. But some persons, even amongst those who have observed

the Chancellor exercising the whole appellate jurisdiction in the House of Lords by himself, not only without complaint, but with many and great advantages to the public, will nevertheless object to such high judicial power being almost undisguisedly placed in the hands of one man. The objections to a single Judge appear to me to be insignificant when compared with the many advantages which flow from the concentration of responsibility; and, perhaps, these advantages might be preserved under an arrangement which would remove some of the supposed objections, by providing the Chief Judge with constant advice and assistance in the following manner:—Let one common lawyer, one Equity lawyer, one Scotch lawyer, and one civilian, be appointed for the purpose, and summoned to attend the King's Council in the House of Lords. Let them not be Peers, but called Lords' Assistants, or Assessors of the Chief Judge, &c. Let them receive salaries, and make it their duty to attend the Chief Judge of Appeals during the whole of his sittings. Make the decisions of the Chief Judge final and conclusive, but forbid him to decide till he has first heard the opinion of the Lords' Assistants. This would still place the responsibility in the hands of the Chief Judge, but would secure the assistance of the others in the preparation of his opinion.

“On the other hand the Lords' Assistants, not being responsible for the decision, and being only responsible to public opinion for their advice, might not be so cautious as they ought to be, and might by their conduct impede the business or lessen the authority of the judgment. Considering, however, that the Lords' Assistants would be in an admirable situation to qualify themselves for the office of Lord Chief Judge, who would probably be selected from among them, the risk of such misconduct is not great.

“3. Those who object to a single Judge, either with or without assistants, will of course require, that the Court of Appeal should consist of co-ordinate Judges, and to satisfy them it would be necessary to give peerages and salaries to three or four competent lawyers, whose duty it should be to sit with the Lord Chief Judge of Appeals, and with him constitute a sort of quorum of the House of Lords, for hearing and determining appeals by a majority of votes, or by the casting vote of the Chief Judge.

“In any arrangement, popular objections would be made to the House of Lords being enabled to sit in its judicial capacity, notwithstanding its adjournment for political and legislative purposes, and notwithstanding the prorogation or dissolution of Parliament, but it is as necessary to separate the judicial and political func-

tions of the House of Lords, as it is to separate the corresponding functions of the Chancellor; and if the House of Lords could be made a satisfactory and effective Court of Justice there seems to be no reason why it should not be always open and accessible; and it would seem that the object might be effected with due regard to the prerogative of the Crown and the dignity of the House, by passing an Act to enable the Crown, on an address of the House, to appoint one or more Lord or Lords of Appeal in the House of Lords, and give them authority to hear and determine appeals during the sitting of Parliament, and notwithstanding the prorogation or dissolution of Parliament.

"From the foregoing observations and suggestions it appears that the incompatible offices of the Chancellor cannot be properly separated, nor the business of the Court of Chancery properly provided for, without the appointment of at least two new officers.

"1. An additional Judge in Chancery, having authority to hear and determine all those causes and matters of original jurisdiction, which have heretofore been heard and determined by the Chancellor in the Court of Chancery.

"2. A chairman of the House of Lords when sitting in its judicial capacity.

"The Chairman of the House of Lords, in its judicial capacity, might be made Chief Judge of Appeals, and with such a Judge the House of Lords might be made an efficient and satisfactory Court of Appeal, always accessible, and it might be reasonable to transfer to it the appellate business of the judicial Committee of the Privy Council.

"And the Chancellor, being relieved from his judicial business, might, as it is conceived, *become an efficient Secretary of State for the affairs of justice and legislation, and secure to the country many incalculable benefits, which under the present arrangements cannot be obtained.*

"The salary of the Chancellor is 10,000*l.* a year.

"The amount of his fees as Speaker of the House of Lords is variable; the highest of which there is any account was 7205*l.*; the average is said to be 4000*l.* a year.¹ The two sums together form a fund more than sufficient to pay the additional Judge in Chancery and the Lord Chancellor, as he would remain after the proposed change.

¹ This is now settled at 4000*l.*, and is paid under the Sessional Appropriation Act.—En.

“The salary of the Chief Judge of Appeals in the House of Lords would have to be provided. And if it should be thought expedient to appoint assessors or co-ordinate Judges, the expense would be proportionably increased.”

This is a clear and able statement. We will now give Lord John Russell's opinion on the subject, who looked at the whole matter not so much as a Law Reformer as a statesman.

This will be found in Hansard, third series, vol. 55., pp. 1326., *et seq.*

He said, — “He could not disguise his opinion that the present state of the Court of Chancery was unsatisfactory. It was impossible that the public could be satisfied so long as this Court was without Judges constantly bound to attend.

“With regard to the Bill introduced by the Lord Chancellor three or four years ago for disconnecting the civil and political functions of the Lord Chancellor and for the appointment of a permanent Judge, considering the immense importance of the functions of the Court of Chancery, the immense benefit which it rendered to persons possessed of property throughout this kingdom, the vast control which it exercised over the commercial interests of the country, it did appear to him to be the common sense of the subject that there should be, as in the Queen's Bench and Common Pleas, A PERMANENT JUDGE at its head. Let them take into consideration the high personal character of the present Lord Chancellor (Lord Cottenham), and remember how by the vote upon the Jamaica Question last year, they might have lost his high legal and judicial qualities for no reason whatever but the fact of a political change. He should say the same thing of a person of opposite politics, and he begged to ask whether this was not a misfortune and a fault in the Constitution. *It was plain that no man could combine satisfactorily these two characters. He considered this to be a fault both legally and politically.*”

As there are many persons who will not think for themselves, but are guided wholly by authority, we have stated these two opinions on this subject. We can only add that since they were given, circumstances have tended to confirm

their correctness. That Lord Cottenham's displacement from the Court of Chancery on political reasons, would have been deeply regretted, is not more true than that the loss of Lord St. Leonard's, as Chief Judge in Equity, would be felt most severely. Whether these duties then are not sufficient for any one man is also open to little doubt; and we may say, we trust without offence, that it may not always be possible to add to great legal and judicial qualifications the mind and education necessary for a MINISTER OF JUSTICE.

ART. X. — LORD ELDON. — CHANCERY JUDGES.

It is hardly necessary to remind the reader of the long and vehement warfare waged by all Law Reformers with Lord Eldon. That he greatly retarded the progress of improvement there can be no manner of doubt. That his judicial powers, too, in some respects of the highest order, were yet of much less avail, either to the administration of justice, or to his own renown, in consequence of the same weakness which made him shrink from any change in the legal system with which he was more thoroughly acquainted than any other lawyer in any age of our jurisprudence, is equally certain. Yet it is impossible to deny that great unfairness is shown towards his memory by those who, merely regarding the proceedings of his successors, and observing the dispatch with which they have conducted the business of the Courts where he presided, institute a comparison between the amount of work done and the time taken for it at the different periods, without considering also the difference in the judicial force which Lord Eldon and his successors wielded. It becomes the more necessary to do this great lawyer and gifted man justice, that he has left none of his family behind him who are in a position to make the truth of the case be duly considered. It is in a peculiar manner incumbent on those to perform this duty of common fairness, as well as

charity, who differ so widely from him in opinion upon all legislative questions touching our jurisprudence.

The two Courts over which he presided for so many years, above a quarter of a century, were the House of Lords and the Court of Chancery. In the Privy Council he only attended very rarely, upon some nine or ten special occasions during the whole period of his Chanceryships; and of the eighteen months that he sat in the Common Pleas it is unnecessary to speak, further than to note, what was well known to the profession, and admitted by all, that he there displayed all the capacity and all the learning for which he afterwards was celebrated, without any of the defects which so greatly impeded his application of them. The exigencies of jury trial and the presence of other Judges precluded all undue hesitation, and enforced the giving a close, sustained attention to the business in hand. But it is to the House of Lords and the Court of Chancery that we must direct our attention.

The state of the business at different periods in the latter, the arrear that accumulated, or the numbers of causes heard and disposed of, we need not go into, further than to admit that in Lord Eldon's time great occasion of complaint was given. We shall take our examples rather from the state of the business in the House of Lords, because the returns are more full, and they are more easily analysed; and we shall here, as we have regarding the Court of Chancery, admit that much greater arrears were suffered to grow in his time than have since been known. But our best course will be to give a summary of the causes heard and disposed of during the periods of successive Chancellors, and then make our statement, in justice towards Lord Eldon, and indeed also to Lord Thurlow and Lord Loughborough, of the very different state of the judicial force in their times and in the times of succeeding Chancellors.

In Lord Thurlow's time, taking only his last two years, there were 37 causes heard and 34 decided. In Lord Loughborough's, from 1793 to 1800, or eight sessions, 109, and no arrear in decisions. In Lord Eldon's first chanceryship, 81 heard and 78 decided in five sessions. In Lord Erskine's

26, and nearly all decided. In Lord Eldon's second chancellorship, from 1807 to 1813, seven sessions, and 70 causes heard and all decided. But a great increase had now taken place in the number of appeals presented. In seven sessions there were 568, whereas in seven sessions ending 1800, only 261 had been presented. The arrear accordingly grew exceedingly, and this, together with an arrear, but far less considerable, in the Court of Chancery, gave rise to the appointment of the first Vice-Chancellor. The effect was at once perceived. The average of the causes heard during the six preceding sessions was 10; the average during the next seven sessions was 48, there having been 288 heard. In 1820, though the session had begun in November, 1819, and lasted about twelve months, with the interval of the General Election, only 21 causes were heard; but then the Queen's case had occupied, and not very creditably occupied, the Lords as well as the Commons and the country, above half of the time. Then the number of appeals again increased more rapidly than before, no less than 262 being presented in three years ending 1823. An arrangement was thereupon made for Lord Gifford (Master of the Rolls) to sit in the House of Lords, and no less than 91 causes were heard in each of the two years, 1824 and 1825, being the greatest number ever heard in any session, except that of 1831, when 111 were heard. That session began under Lord Lyndhurst in Nov. 1830, and was continued under Lord Brougham to late in October, 1831. From 1821 to 1827, when Lord Eldon quitted the Great Seal, 350 causes were heard by Lord Gifford and him in six sessions. In Lord Lyndhurst's first chancellorship, of four sessions, 184 were heard, and 144 decided. In Lord Brougham's time, of four sessions, 225 were heard, and 219 decided. In 1835 the Great Seal was in Commission, and Lords Lyndhurst and Brougham took the appeals: 64 were heard, and all but 4 decided. In Lord Cottenham's first chancellorship, of four sessions, 152 were heard, and 140 decided. In Lord Lyndhurst's last chancellorship, of five sessions, 171 were heard; and in Lord Cottenham's last period, of three sessions, 90 were heard. In 1850 there was a Commission, and Lord Brougham

taking the appeals during the last two months of the session 22 were heard and decided. In 1851, under Lord T. 20 were heard, and 9 decided. In 1852, under Lord T. till February, and after that under Lord St. Leonard's were heard, and 33, that is all heard by the latter, decided.

We have, in making this statement of numbers, incidentally mentioned the only two instances of Lord Eldon receiving additional aid to that which each of his predecessors had in performing the duties of his office. But it is fit that we should show how greatly in the time of his successors, there has been an increase in the force of the Court, we may say of the Courts, because whatever relieves the Court of Chancery operates an almost equal relief to the Lords, from the circumstance of the same Judge presiding in both. It is consequently necessary, in common fairness to Lord Eldon, that this increase should be always borne in mind when we are comparing his proceedings with theirs.

Before the year 1813, and during the first eleven years of his life he held the Great Seal, there were nominally two superior Judges in the Court of Chancery besides the inferior Judges and the Masters; but in reality, those two were rather fractions than integers: for beside the interference of his political duties on the part of the Chancellor, the Master of the Rolls sat only a few hours in the evening, except during one week after each term. He sat one and sometimes two days a week in the Privy Council. We may reckon these two Judges, far as Chancery was concerned, equal to one and a half. Then came the Vice-Chancellor's appointment in 1813, and in passing, as we are seeking to do Lord Eldon justice, we may remark on the charges so frequently and so falsely made against him of pecuniary meanness, that half the Vice-Chancellor's salary was by his bill deducted from that of the Chancellor. This addition of one Judge made a very considerable difference in the judicial force; it was thus increased from the proportion of three to five. It remained at this point during the whole of Lord Eldon's incumbency. But soon after he quitted office, a new arrangement was made by which the Master of the Rolls sat in the morning; and in 18

bankruptcy was almost entirely removed from the Chancellor's jurisdiction. It used in Lord Eldon's time to occupy nine or ten weeks, or about a fourth of the judicial year. This creation of the Bankruptcy Court and the change at the Rolls may be estimated as having, with the creation of the Vice-Chancellor, raised the judicial force in the proportion of three to seven.

But then came the measure of 1841, when two Vice-Chancellors were added, raising the force to eleven; and last of all came the new Judges of appeal in Chancery, the Lords Justices, in whom are vested all the powers of the Chancellor without any exception when sitting together, and the power besides of sitting separately, so that as compared with the time of Lord Eldon's predecessors and with the first eleven years of his own incumbency, the judicial force of the Court has increased from three to fifteen—it has been augmented five-fold. It is true that the arrangement by which Lord Gifford presided for two sessions in the House of Lords, gave Lord Eldon great relief during those years; but it is equally true that in all the sessions after 1834, his successors had the like relief from the constant attendance of ex-Chancellors, who not only sat with the Chancellor, but took appeals on the days when he did not leave his own Court. The result, therefore, of the whole comparative view is, that ever since Lord Eldon retired, it has become a much easier task to dispose of the business, whether in the Lords or the Court of Chancery, than it was at any period of his long Chancellorship.

That the business has increased at least in Chancery, there can be no doubt. But has it increased in the same proportion with the judicial power added to the Court? Has it increased five-fold, or anything like five-fold? We believe no one will maintain such a proposition. Nor is it only to do Lord Eldon justice that this question is now asked. Another and a practical purpose may be served by the inquiry, to which we solicit the attention of the profession. The abolition of the Master's office has directed the minds of some to the possibility of more Vice-Chancellors being required. Let us hope that before any such conclusion is come to, the

most careful consideration will be given to the question which we have propounded; that the distinction will be marked between a permanent, and what is in all probability only a temporary increase of Equity business; and that until every means shall have been adopted by which the great judicial force now in the Court can be most effectually used, no further addition to it will be thought of.

ART. XI.—CHANCERY REFORM MEASURES.

1. *An Act to abolish the Office of Master in Ordinary of the High Court of Chancery, and to make Provision for the more speedy and efficient Dispatch of Business in the said Court* (15 & 16 Vict. c. 80.).
2. *An Act to amend the Practice and Course of Proceeding in the High Court of Chancery* (15 & 16 Vict. c. 86.).
3. *An Act for the Relief of the Suitors in the High Court of Chancery* (15 & 16 Vict. c. 87.).
4. *General Orders and Rules of the High Court of Chancery, issued by the Lord High Chancellor, August 7th, 1852.*

At length the country is presented with a series of measures, which exhibit the characteristics of sound and real reform, and bid fair to remedy some of the most crying evils attendant upon the course of justice in the High Court of Chancery. The Acts of the last Session, coupled with the General Orders since promulgated by the Lord Chancellor, with the assistance of the Judges¹, are a substantial instalment towards the liquidation of that great debt, which has so long been owing to the country from its lawyers and states-

¹ The painful intelligence was received within ten days after the date of these orders, that one of the most honoured names by which they are signed and sanctioned was removed from the scene of his early success and usefulness, by a sudden and untimely death. Sir James Parker's short career as a Vice-Chancellor was sufficient to distinguish him as a most able Judge, whose future elevation to the highest seat in Westminster Hall was contemplated by the Profession as a possibility which would have admirably subserved the public.

men; and if these measures are carried into operation in the same spirit in which they appear to have been conceived, it is not too late, even for the Court of Chancery, to acquire a good name and repute among the public establishments of the land.

It is remarkable, that an institution so useful and blameless in its origin, and rendered indispensable in its functions by the deficiencies of the Common Law, should, for want of timely interference, have been suffered by the country to degenerate into a curse and a byeword, and to foil every scheme heretofore propounded for its reformation. It needed no reports of the case of *Jarndyce v. Jarndyce* from the lively pen of Dickens the younger (for Chancery has already had its elder Dickens) to rouse the public mind to a pitch of determination, which rendered all further trifling on such a subject inadmissible.

The temper of the late House of Commons was, in this respect, an undoubted reflection of the national feeling; and experienced lawyers, who enjoyed seats in that Assembly, were thoroughly convinced that another Jacob Omnium might have induced the House, by a well-timed petition, to repeat the precedent of the Palace Court, and to effect a revolution, under which half the Bar of England might have awoke some morning to the discovery, — that by a Parliamentary vote of the previous night, their occupation was extinguished, and the Court of Chancery numbered with the Star Chamber and the Court of High Commissioners. So vast an amount of property is involved in Chancery litigation or administration, and so many persons are interested in the results, that the matter became a topic of popular agitation, which it was absolutely necessary to appease.

With this state of public feeling accompanying their labours, the Commissioners appointed by the Crown to inquire into the interests of the Court, His sound judgment, logical method, and extensive legal acquirements, are said to have quickly recommended him, when at the bar, to the favourable notice of Lord Chancellor Truro, who formed the resolution, which he afterwards so handsomely fulfilled, without the smallest regard to political considerations, of raising him to the Bench on the earliest opportunity. The profession and the public have equal occasion to deplore the loss of so valuable a judge, and so excellent a man.

quire into the practice and constitution of the Court, entered upon their duties. In our opinion the original Commissioners, who were all lawyers, were well selected; and the subsequent addition of two non-professional members — Sir James Graham and Mr. Henley — was well calculated to increase public confidence in their deliberations and resolutions. Their Report was presented to the Crown at the beginning of the present year, and was immediately laid before the two Houses of Parliament. Bills, embodying the resolutions of the Commissioners, were likewise in progress. But the political changes, to which the last Session gave birth, had well nigh postponed the consideration of Chancery Reforms to a more convenient season. Many of the suggestions of the Commissioners were reputed to be distasteful to the new Lord Chancellor, in whose department the consideration of these measures, and the charge or carriage of the bills for carrying them into execution, necessarily lay. The abolition of the Masters was understood to be peculiarly obnoxious to His Lordship; and if the temper of the nation had not been thoroughly manifest at the time in question, excuses might readily have been found, amidst the pressing avocations of a new and unsettled Ministry, for shelving the whole subject of Chancery Reform. The demands, however, of the country were listened to by the Government: and if we except the institution of the County Courts, the Act which stands first in the list prefixed to the present Article, is probably the greatest triumph yet achieved by Law Reformers. Every attempt to improve the Masters' Offices had utterly failed.

One of the most experienced of the Masters themselves long since felt bound to declare, that his Office was utterly incapable of improvement, and that abolition was the only rational amendment of the system. This has now been carried into effect; and the Judge-Master is the substituted functionary, according to the principle so long advocated in this Review. In other words, the Master of the Rolls and the Vice-Chancellors are to carry their own decrees into execution, so far as such labours have hitherto been thrown upon the Masters, and are to sit at Chambers with a staff of

competent clerks to perform these new duties. What effect this change will produce upon the Court business allotted to these learned personages, remains to be seen.

But no consequences can be worse than those which resulted from the former system of references to the Masters. Much, however, as we approve of the substitution of the Judges and their clerks for the Masters, the new scheme is not unaccompanied with danger; as an inert or supine Judge may gradually throw upon his subordinate officers the work or duty which he ought to discharge in person, and may even carry this delegation to a greater extent than under a reference to a Master. Usurpations may also spring up on the side of the clerks; and already we hear of the new clerks giving themselves airs, and talking of themselves as Judges. Against this the Judges must guard, if the public interests are to be duly protected.

We think it unnecessary further to discuss this great alteration in the Constitution of the Court of Chancery; and we therefore proceed to the consideration of those changes which have been introduced by the Legislature into the procedure of the Court. The principal alterations thus effected are distributable under four heads; viz. Parties — Pleadings — Evidence, — and Decrees.

I. Parties to Suits.

For a long time past the skill and ingenuity of Equity Pleaders have been severely taxed at the outset of a suit, in determining what persons are necessary or unnecessary parties to the record, either as plaintiffs or defendants, or individually or by representation; and the Reports abound with learned and laborious decisions upon the rugged subjects of mis-joinder and non-joinder.

A separate treatise has even been composed by an "eminent hand" for the guidance of Equity draftsmen in this branch of their duties; and an important collection of scientific rules upon the subject has been ably deduced from the decisions of a long line of Judges, under whose hands the system had reached its supposed perfection. All these rules were referable to maxims or even to axioms of Jurisprudence.

But experience has shown that rules of practice, though based upon the soundest and most irrefragable principles of justice, may nevertheless be accompanied in their application by evils, which no advantages afforded by adherence to such rules can adequately compensate. They may, in fact, become instruments of downright injustice. What can be more reasonable or more unassailable, as a bare proposition, than the rule, that no man's right shall be disposed of behind his back, or without affording him the opportunity of protecting and defending them? Yet in the rigid observance of this rule the source is discovered of one very expensive and dilatory part of Chancery Procedure. When a large class of persons were interested in a testator's residuary estate, or in his land, even by virtue of a trivial legacy charged thereon, it was not deemed sufficient to bring one of such a class before the Court as the representative of the rest, and to leave him to defend the common rights of all, but every one of such persons, notwithstanding their identity of interests, was personally brought forward on the record, and by the process of the Court, as a substantial party to the proceedings. He employed his separate solicitor, he filed his separate answer, he entered separately into evidence, he appeared by his own counsel — frequently more than one — at the hearing of the cause; and thus, occasionally, a perfect army of counsel received briefs in a cause for little more than formal purposes, while the length of the record was inordinately magnified, and copies of all the papers extravagantly multiplied. This accumulation of proceedings inevitably caused delay, and palpably created vast additional expense. Every one concerned in the cause of *Day v. Croft*, which was instituted about a dozen years ago for the administration of the estate of the late Mr. Day, the opulent blacking manufacturer, will recollect a perfect illustration of what we have just referred to. There were 120 defendants, and the matter became so serious as to give rise to petitions to the House of Commons from some of the less submissive legatees. On the most ordinary application to the Court, briefs were frequently delivered to six and thirty counsel; and the obstruction, that so numerous a body of defendants had thus

the power of creating to the progress of the cause was such, that the plaintiff was obliged at every step of the proceedings to buy off their opposition, by consenting that the costs should come out of the estate. The pillage hence arising was obviously enormous. The rule of joinder was in this case strictly adhered to; but valuable as general rules may be, the ebrach of them on proper occasions is no unimportant part of wisdom.

The Chancery Commissioners thus deal with the present subject of Parties and the rules of Joinder in Pleading: —

“ We have before noticed, that the general rule of Courts of Equity is, that all persons interested in the subject matter of the litigation should be parties to the suit, so that the Court may in the one suit make a final determination as between all parties. For example, if the subject of the suit be the execution of the trusts of a settlement, an account of the trust funds, the recovery of trust property improperly alienated, or the making good the loss occasioned by a breach of trust, all the persons beneficially interested in the trust property on the one side, and on the other side all the surviving trustees, all the persons necessary to represent the estates of the deceased accounting parties, and all persons, and the representatives of all persons, liable to contribute to the loss, are required to be parties. If a partnership firm be amongst the persons liable, the rule would require not only all the partners but the representatives of deceased partners. In a suit to foreclose or to redeem a mortgaged estate, all encumbrancers on the equity of redemption sought to be foreclosed in the one case, and all parties having a prior right to redeem in the other, must be made parties. It sometimes happens, not only that the estates are subject to several mortgages, but that there are judgment-creditors whose judgments are incumbrances, that the estates have been conveyed to trustees for the benefit of schedule creditors, and that the persons interested in the estates have died, having made complicated dispositions of their property; all the persons so interested must be parties to the suit relating to such incumbrances. Sometimes a person has a puisne incumbrance on property, and the persons prior to him in point of charge on that particular property have charges on other estates for their demands, which may be sought to be wholly or partially satisfied by such securities. Such collateral securities (which may be themselves the subject of similar equities) must be brought into the-suit. The immense compli-

cation which thus arises, and the great number of parties to be brought before the Court, may be easily conceived. The embarrassment thus occasioned to a plaintiff does not stop here. If any person so interested should be dead, and no one has thought it worth while to prove his will, or take out administration to his estate, the plaintiff is himself obliged to take proceedings in the Ecclesiastical Court for the purpose of compelling some person to administer, or, in default, to obtain letters of administration to a nominee limited to the purposes of the suit; and such nominee administrator, who serves no useful purpose whatever, is made a formal party to the suit in Chancery, is served with process, puts in an answer, and appears by counsel. We recommend, that in no such case shall it be necessary to take out administration, but that the Court shall be authorised either to proceed in the absence of any person representing the estate of the deceased, or to appoint some person to represent such estate, for all the purposes of the suit, on giving such notice, if any, and to such person or persons, if any, as the Court shall think fit. There is probably nothing in Chancery procedure which has tended so much to augment expense and delay as the rules of the Court as to parties. They operate not merely by the multiplication of parties in the first instance, but by creating the necessity, upon every birth and every death, of making fresh parties by fresh proceedings."

The error of the practice now under review consisted in requiring all interested parties to be personally connected with the suit by *pleading*. But at the ruinous expense and delay arising from the joinder of all such persons as parties to the record, it will be seen that the new statutory rules of pleading have struck a decisive blow. The 42nd section of the stat. 15 & 16 Vict. c. 86. is as follows:—

"It shall not be competent to any defendant in any suit in the said Court to take any objection for want of parties to such suit, in any case to which the Rules next herein-after set forth extend; and such Rules shall be deemed and taken as part of the law and practice of the said Court, and any law or practice of the said Court inconsistent therewith shall be and is hereby abrogated and annulled:—

"Rule 1. Any residuary legatee or next of kin may, without serving the remaining residuary legatees or next of kin, have a decree for the administration of the personal estate of a deceased person.

" Rule 2. Any legatee intereste
estate, and any person intereste
directed to be sold, may, witho
person interested in the proceed
the administration of the estate

" Rule 3. Any residuary de
any co-residuary devisee or co

" Rule 4. Any one of seve
or instrument may, without
trust, have a decree for the
instrument.

" Rule 5. In all cases c
pending litigation, and in
person may sue on behalf
same interest.

" Rule 6. Any execu
decree against any one
for the administratio
trusts.

" Rule 7. In all th
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" Rule 8. In
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estate; and in such cases it shall not be necessary to make the persons beneficially interested under the trusts parties to the suit; but the Court may, upon consideration of the matter, on the hearing, if it shall so think fit, order such persons, or any of them, to be made parties."

These rules are of genuine practical utility, and will, we think, approve themselves to the mind and judgment of every practitioner. But we particularly call attention to the eighth of the foregoing rules, as it appears to us to dispose with full effect of many, if not all, of the objections which might arise from an adjudication upon a man's rights in his absence, and to reconcile the procedure of the Court with the sound rule, to which we have adverted, of giving every man an opportunity of being heard upon a question affecting his property or his rights. One or more of a class having been heard upon a question involving rights common to all the members of such class, the notice required to be given of the decree to the absent parties acquaints them with the proceedings and their present posture thereunder, and connects the whole class with the suit as completely, and with as adequate means of modifying or influencing the decree, as if every member had been called upon to *plead* in the first instance. The Lord Chancellor has, by the forty-first of the New General Orders, directed that a memorandum of service of every such notice of a decree under the foregoing rule shall be entered with the clerks of records and writs, while the fortieth of the same Orders provides that the time within which a party served with notice of a decree under the same rule may apply to the Court to add to the decree, is to be one month after service of notice. It will be a question for judicial decision what parties are to be served with notice of such application.

The value, however, of pleadings, when suitably and inexpensively framed, is not to be overlooked: and though we are satisfied that in very numerous cases a notice of the decree will answer every purpose of substantial justice, it is quite within the range of possibility, that a party served with notice of a decree may bring forward such new matter as virtually to render all the prior proceedings useless. Great hardship

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may hence arise to innocent parties, as time and money will have been spent with equally fruitless results; and those who are served with notice of a decree are not bound to intervene before such notice has been served. We have put what may be reckoned an extreme case: but those who are familiar with the course of litigation are well aware that such cases may occur. But these on the other hand may be well balanced by the number of cases, in which the necessary presence of a multitude of parties on the record has been an insuperable barrier against obtaining any justice at all, as in the case of ill-defined associations not falling within the rules of the Joint Stock Company's Acts, or possessing parliamentary or other charters of incorporation. Such cases appear to us to be relieved in a considerable degree by the 51st section of the same Act, which enables

“ The Court to adjudicate on questions arising between parties, notwithstanding that they may be some only of the parties interested in the property respecting which the question may have arisen, or that the property in question is comprised with other property in the same settlement, will, or other instrument, without making the other parties interested in the property respecting which the question may have arisen, or interested under the same settlement, will, or other instrument, parties to the suit, and without requiring the whole trusts and purposes of the settlement, will, or other instrument to be executed under the direction of the Court, and without taking the accounts of the trustees or other accounting parties, or ascertaining the particulars or amount of the property touching which the question or questions may have arisen: provided always, that if the Court shall be of opinion that the application is fraudulent or collusive, or for some other reason ought not to be entertained, it shall have power to refuse to make the order prayed.”

It was not without some feelings of surprise that we discovered also in the Act a fulfilment of the bold recommendation of the Commissioners, that the Court should be authorised to nominate personal representatives *ad litem*, where parties have died leaving no regularly constituted executors or administrators. This is a great invasion of the franchises of Doctors' Commons, and indicates decided firmness of pur-

pose in cheapening and expediting the procedure of the Court. The Act 15 & 16 Vict. c. 86. s. 44. thus embodies the suggestion of the Commissioners:—

“ If in any suit or other proceeding before the Court it shall appear to the Court that any deceased person who was interested in the matter in question has no legal personal representative, it shall be lawful for the Court either to proceed in the absence of any person representing the estate of such deceased person, or to appoint some person to represent such estate for all the purposes of the suit or other proceeding, on such notice to such person or persons, if any, as the Court shall think fit, either specially or generally, by public advertisements; and the order so made by the said Court, and any orders consequent thereon, shall bind the estate of such deceased person in the same manner in every respect as if there had been a duly constituted legal personal representative of such deceased person, and such legal personal representative had been a party to the suit or proceeding, and had duly appeared and submitted his rights and interests to the protection of the Court.”

Thus much as to non-joinder in pleading.

With respect to *misjoinder* — often a very venial jeofail — the Act 15 & 16 Vict. thus well provides in s. 49.: —

“ No suit shall be dismissed by reason only of the misjoinder of persons as plaintiffs therein, but wherever it shall appear to the Court that, notwithstanding the conflict of interest in the co-plaintiffs, or the want of interest in some of the plaintiffs, or the existence of some ground of defence affecting some or one of the plaintiffs, the plaintiffs, or some or one of them, are or is entitled to relief, the Court shall have power to grant such relief, and to modify its decree according to the special circumstances of the case, and for that purpose to direct such amendments, if any, as may be necessary, and at the hearing, before such amendments are made, to treat any one or more of the plaintiffs as if he or they was or were a defendant or defendants in the suit, and the remaining or other plaintiff or plaintiffs was or were the only plaintiff or plaintiffs on the record; and where there is a misjoinder of plaintiffs, and the plaintiff having an interest shall have died leaving a plaintiff on the record without an interest, the Court may, at the hearing of the cause, order the cause to stand revived as may appear just, and proceed to a decision of the cause, if it shall see fit,

and to give such directions as to costs or otherwise as may appear just and expedient."

We shall therefore no longer hear of a bill being dismissed because a man was joined as a co-plaintiff with his wife in a suit relating to her separate estate, or on other equally grave grounds of objection.

Intimately connected with the subject of parties to suits, and most materially influential with reference to the expenses of such proceedings, was the practice of filing bills of revivor and supplement, on the abatement of suits by the death or marriage of parties, or the transmission of their rights to others by bankruptcy or any other course of devolution. Such bills set forth, according to the early practice, every tittle of the previous proceedings in a cause: and when eight or nine such bills were rendered necessary by the course of events, the magnitude of each successive bill increased like a snowball. And in a most extensive class of cases, when such a bill was put on the file, either no answer at all, or a mere formal one, was recorded by or sought from the defendant, on whose part the matter was taken as a dry technicality involving no substantial result, beyond the fee of the pleader and the profits of his employer. Lord Chancellor Cottenham's Orders of 1841 made some provision for curtailing the prolixity of bills of revivor and supplement: but it was ineffectual. The real remedy in the cases to which we have referred was abolition: and this has been effected by the 52nd section of the Act 15 & 16 Vict. c. 86. in the following terms, which are carefully drawn, and do not admit of easy or accurate abridgment.

"Sec. 52. Upon every suit becoming abated by death, marriage, or otherwise, or defective by reason of some change or transmission of interest or liability, it shall not be necessary to exhibit any bill of revivor or supplemental bill in order to obtain the usual order to revive such suit, or the usual and necessary decree or order to carry on the proceedings; but an order to the effect of the usual order to revive, or of the usual supplemental decree, may be obtained as of course, upon an allegation of the abatement of such suit, or of the same having become defective, and of the change or transmission of interest or liability; and an

order so obtained, when served upon the party or parties who, according to the present practice of the Court, would be defendant or defendants to the bill of revivor or supplemental bill, shall from the time of such service be binding on such party or parties, in the same manner in every respect as if such order had been regularly obtained according to the existing practice of the said Court; and such party or parties shall thenceforth become a party or parties to the said suit, and shall be bound to enter an appearance thereto in the office of the clerks of records and writs, within such time and in like manner as if he or they had been duly served with process to appear to a bill of revivor or supplemental bill filed against him; provided that it shall be open to the party or parties so served, within such time after service as shall be in that behalf prescribed by any general order of the Lord Chancellor, to apply to the Court by motion or petition to discharge such order on any ground which would have been open to him on a bill of revivor or supplemental bill stating the previous proceedings in the suit and the alleged change or transmission of interest or liability, and praying the usual relief consequent thereon; provided also, that if any party so served shall be under any disability other than coverture, such order shall be of no force or effect as against such party until a guardian or guardians *ad litem* shall have been duly appointed for such party, and such time shall have elapsed thereafter as shall be prescribed by any general order of the Lord Chancellor in that behalf."

II. *Pleading.*

It has been remarked that in England all human affairs are tedious, and that pleasure and business labour equally under this defect. Plays, concerts, speeches, and sermons, are all become too long. Was it possible, then, that Chancery Pleadings should escape this general characteristic? Nor did they. But the remarkable feature of the present day is, that conciseness in pleading is now enjoined by Act of Parliament. Whether this is within the range of Parliamentary omnipotence remains to be seen. One man's language differs as much from another's as his face: but prolix statements of legal documents can and must be in every case repressed. The inherent powers of the Court, however, were not deficient in this respect: and the jurisdiction has been exercised on various recent occasions in a salutary manner by directions

to the Taxing Master in settling the costs. The exclusion of interrogatories from bills will, of course, cut down those documents to one half of their pristine length at a blow ; and we regard this as a most useful regulation, not merely for the improvement which it effects in the form of the bill, but for the means which it affords of dispensing with the numerous useless answers which were formerly required by the unbending rules of the Court. The Act 15 & 16 Vict. c. 86. thus deals with the present subject : —

“Sec. 10. Every Bill of Complaint to be filed in the said Court after the time herein-after appointed for the commencement of this Act shall contain as concisely as may be a narrative of the material facts, matters, and circumstances on which the plaintiff relies, such narrative being divided into paragraphs numbered consecutively, and each paragraph containing, as nearly as may be, a separate and distinct statement or allegation, and shall pray specifically for the relief which the plaintiff may conceive himself entitled to, and also for general relief ; but such bill of complaint shall not contain any interrogatories for the examination of the defendant.”

“The procedure by bill and answer (say the Chancery Commissioners) was admirably adapted for certain cases ; as, for instance, cases of fraudulent dealings by persons in a fiduciary position, other cases of fraud, and cases in which the injured persons are in the dark as to the details and extent of the malfeasance ; and it is necessary to probe the defendant’s conscience in every way, to extort full information from him, and, with access to his documents, to submit him to the most searching examination, and to compel him to explain and re-explain all his statements. But the misfortune to suitors in the Court of Chancery is, that this procedure has been applied to many cases, and that the expense of the protection afforded often absorbs the whole amount of the property protected.” (*Report*, p. 11.) It was doubtless from a perception of this evil that the more summary process by petition has been sanctioned by the Legislature in various branches of Equity jurisdiction. Sir Samuel Romilly’s Act with reference to charities, and the several Acts relating to railways and public undertakings, the Joint Stock Companies Winding-up Acts, the Trustee Acts, and the Irish Chancery

Act of 1850, are instances of this disposition ; and, so far as a petition has thus been substituted for a bill, the Profession and the suitors have equally applauded the measures. We attribute this result to the deliverance which it effected from the long-winded and expensive answers which the filing of a bill involved. The old English bill, however, was not accompanied by the incumbrance of interrogatories. They were an addition of later growth ; and we think that even the most conservative of practitioners must find a solace in seeing the ancient proceeding by bill restored to its early limits by the new arrangements, while the power of filing interrogatories for the examination of the defendant is retained, as a separate process, for those cases where such a proceeding is considered likely to be of real advantage to the suitor.

The introduction of claims, though rather an inartificial contrivance, has, we think, paved the way for the new system of pleading by bill without interrogatories ; and now that this latter change has been introduced, claims, if used at all, will most probably be restricted to those cases which are sufficiently covered by the common forms appended to the General Orders of April, 1850.

The disadvantage of a claim or a petition in a contested case arose from the want of compulsory means of obtaining evidence from the defendant, or from witnesses who were reluctant to make the necessary affidavits. But this defect is now cured by the new enactments, which enable any party on a claim, motion, petition, or other interlocutory proceeding, to summon witnesses, and examine them on interrogatories, in the same manner and with the same power of cross-examination on either side, as upon issue joined in a suit commenced by bill. Witnesses who have made affidavits are also in future to be subject to cross-examination by the opposite party. (15 & 16 Vict. c. 86. s. 40.) This is a great assistance to the course of justice : as suits by claim had been seriously discouraged by a decision of the Vice-Chancellor Knight Bruce—that on a contested matter of fact the plaintiff could not be allowed to read his own affidavit as evidence on his own behalf at the hearing of the cause.

We have noticed, under the head of Parties, the abolition of bills of revivor and supplemental bills ; and we shall here only observe, in reference to such bills, that the long-desired power of introducing, by amendment, into original bills all such supplemental matter as occurs while the cause is not too far advanced for an ordinary amendment of the bill according to the present practice, has been conferred by the Act 15 & 16 Vict. c. 86. The fifty-third section is in the following terms : —

“It shall not be necessary to exhibit any supplemental bill in the said Court for the purpose only of stating or putting in issue facts or circumstances which may have occurred after the institution of any suit ; but such facts or circumstances may be introduced by way of amendment into the original bill of complaint in the suit if the cause is otherwise in such a state as to allow of an amendment being made in the bill, and if not, the plaintiff shall be at liberty to state such facts or circumstances on the record, in such manner and subject to such rules and regulations with respect to the proof thereof, and the affording the defendant leave and opportunity of answering and meeting the same as shall in that behalf be prescribed by any general order of the Lord Chancellor.”

Now, in obedience to this enactment, the Lord Chancellor has issued a General Order, No. 44., of the 7th August, 1852, in the following form : —

“If the plaintiff in any cause, which is not in such a state as to allow of an amendment being made in the bill, shall desire to state or put in issue any facts or circumstances which may have occurred after the institution of the suit, he may state the same, and put the same in issue by filing in the Record and Writ Clerk’s office a statement, either written or printed, to be annexed to the bill ; and such proceedings by way of answer, evidence, and otherwise, are to be had and taken upon the statement so filed, as if the same were embodied in a supplemental bill ; provided always, that the Court may make any order which it shall think fit for accelerating the proceedings thereunder, or proceedings therein, in any manner which may appear just and practicable.”

We have read this order with attention, and we are bound to say that, with all deference to the learned personages whose sanction accompanies the order, it is a clumsy and

evasive contrivance. We do not, in fact, see that the statement thus authorised to be annexed to the original bill differs in principle, or in aught but the name, from a regular supplemental bill of the present day; as it is to be followed by answer, evidence, and other proceedings, exactly in the old and accustomed form. We think the ingenuity of the authors of the order has been, in this instance, signally at fault.

Under the head of Pleading we find another reform in the power which is given to a defendant, of exhibiting interrogatories, in lieu of filing a cross bill of discovery, for the examination of the plaintiff upon matters of which a concise statement is to be prefixed. The interrogatories, with this statement, are to be served upon the plaintiff's solicitor, who will file an answer according to the present practice under bills of discovery. After conferring this power on defendants, we do not see why there should be a proviso in the Act reserving power to a defendant to file a cross bill of discovery if he thinks fit. Cross bills for relief are, of course, left untouched by the new measures. (15 & 16 Vict. c. 86. s. 19.)

We have always thought that the time allowed for answering a bill was unnecessarily long; it being quite notorious that, in the great majority of cases, the latitude thus accorded was an inducement to practitioners to defer giving their attention to the subject of the suit till a very advanced period of the allotted time. In fact, the time was constantly altogether disregarded, through the courtesy of the Profession towards its members, except in very hostile cases. But as twelve days only were allowed for a demurrer, — a step which required very serious consideration where it involved the merits of a suit, or something more than a question of nonjoinder or misjoinder of parties, — we think an abridgment of the time for answering was quite justifiable; and now, by the 19th General Order of 7th August, 1852, a defendant required to answer a bill must plead, answer, or demur, not demurring alone, within fourteen days after service of the interrogatories, the Court reserving power to enlarge the time on a special application.

As respects answers, pleas, disclaimers, and examinations, the public convenience has been greatly consulted, by enabling defendants to swear to the truth of them in precisely the same manner as an affidavit has been heretofore ordinarily taken (15 & 16 Vict. c. 86. s. 21.); and with respect to parties resident out of the jurisdiction, the next section of the same Act declares with equal liberality, that —

“All pleas, answers, disclaimers, examinations, affidavits, declarations, affirmations, and attestations of honour in causes or matters depending in the High Court of Chancery, and also acknowledgments required for the purpose of enrolling any deed in the said Court, shall and may be sworn and taken in Scotland or Ireland, or the Channel Islands, or in any colony, island, plantation, or place under the dominion of Her Majesty in foreign parts, before any judge, court, notary public, or person lawfully authorised to administer oaths in such country, colony, island, plantation, or place respectively, or before any of Her Majesty’s consuls or vice-consuls in any foreign parts out of Her Majesty’s dominions; and the Judges and other officers of the said Court of Chancery shall take judicial notice of the seal or signature, as the case may be, of any such court, judge, notary public, person, consul, or vice-consul attached, appended, or subscribed to any such pleas, answers, disclaimers, examinations, affidavits, affirmations, attestations of honour, declarations, acknowledgments, or other documents to be used in the said Court.”

These provisions will get rid of a host of petty difficulties, which continually embarrassed and impeded the progress of suits.

The Legislature has also conceded the boon, which was long since demanded by the Law Amendment Society, that in common administration suits pleadings should be altogether superseded by a summons, upon which a summary order, equivalent to a decree, might be made by a Master in Chancery. But as Masters are abolished, the proposed summary jurisdiction has been conferred upon the Judges sitting at Chambers. The 45th and 47th sections of the Act 15 & 16 Vict. c. 86. thus institute the new jurisdiction: —

“Sec. 45. It shall be lawful for any person claiming to be a creditor, or a specific, pecuniary or residuary legatee, or the next

of kin, or some one of the next of kin of a deceased person, to apply for and obtain as of course, without bill or claim filed, or any other preliminary proceedings, a summons from the Master of the Rolls, or any of the Vice-Chancellors, requiring the executor or administrator, as the case may be, of such deceased person, to attend before him at Chambers, for the purpose of showing cause why an order for the administration of the personal estate of the deceased should not be granted; and upon proof by affidavit of the due service of such summons, or on the appearance in person or by his solicitor or counsel, of such executor or administrator, and upon proof by affidavit of such other matters, if any, as such Judge shall require, it shall be lawful for such Judge, if in his discretion he shall think fit so to do, to make the usual order for the administration of the estate of the deceased with such variations, if any, as the circumstances of the case may require; and the order so made shall have the force and effect of a decree to the like effect made on the hearing of a cause or claim between the same parties; provided that such Judge shall have full and discretionary power to grant or refuse such order, or to give any special directions touching the carriage or execution of such order; and in case of the applications for any such order by two or more different persons or classes of persons to grant the same to such one or more of the claimants or of the classes of claimants as he may think fit; and if the Judge shall think proper, the carriage of the order may subsequently be given to such party interested, and upon such terms as the Judge may direct."

"Sec. 47. It shall be lawful for any person claiming to be a creditor of any deceased person, or interested under his will, to apply for and obtain in a summary way, in the manner herein-before provided with respect to the personal estate of a deceased person, an order for the administration of the real estate of a deceased person where the whole of such real estate is by devise vested in trustees, who are by the will empowered to sell such real estate, and authorised to give receipts for the rents and profits thereof, for the produce of the sale of such real estate; and all the provisions herein-before contained with respect to the application for such order in relation to the personal estate of a deceased person and consequent thereon, shall extend and be applicable to an application for such order as last herein-before mentioned with respect to real estate."

We think that the same short and summary procedure, without pleadings, might be extended with equal propriety

to all common cases of specific performance of agreements between vendor and purchaser, where the title alone is in dispute, and no question arises on the agreement; and also to the extension of all trusts created by deed, such as composition deeds, marriage settlements, and the like. All such reforms bid fair to render justice accessible to the poor, even in the Court of Chancery.

III. *Evidence.*

That portion, which we think the least satisfactory, of the Chancery Reforms of last Session, is the new method of taking evidence *orally* in causes depending before the Court. Why should it not be taken before the judge who hears the cause, and at the time of the hearing? Why should the evidence be taken by one functionary and the cause heard by another? The want of Judges will no doubt be the answer; and the expense is doubtless the main objection to the necessary increase in the number of Judges. It is also occasionally suggested that the ranks of the profession will not supply a larger number of competent men to fill these high situations. But if the Common Law Bar can furnish fifteen effective men for the public service on the other side of Westminster Hall, we cannot doubt that the Chancery Bar is capable of yielding its just quota of accomplished lawyers for the creditable and satisfactory performance of similar duties in the Equity Courts. Mr. Bethell, Sir William Wood, Mr. Swanston, Mr. Rolt, Mr. Roundell Palmer, and others whom it might be invidious to name, are, in our apprehension, no unfit coadjutors to the present learned and eminent men, who discharge the functions of Vice-Chancellors with so much advantage to the country. Most weighty evidence was given before the Commissioners on the advantage of examining witnesses before the Judge who tries the cause: but the Legislature has not thought proper to introduce this rational course of procedure. (See the evidence of James Bacon, Esq., Q.C., and T. H. Plummer, Esq. *Report*, pp. 242, 243.)

The new scheme for taking evidence in the Court of Chancery is contained in the Act 15 & 16 Vict. c. 86.: —

“ Sec. 31. All witnesses to be examined orally under the provisions of this Act shall be so examined by or before one of the examiners of the Court, or by or before an examiner to be specially appointed by the Court, the examiner being furnished by the plaintiff with a copy of the bill, and of the answer, if any, in the cause; and such examination shall take place in the presence of the parties, their counsel, solicitors, or agents, and the witnesses so examined orally shall be subject to cross-examination and re-examination; and such examination, cross-examination, and re-examination shall be conducted as nearly as may be in the mode now in use in Courts of Common Law with respect to a witness about to go abroad, and not expected to be present at the trial of a cause.

“ Sec. 32. The depositions taken upon any such oral examination as aforesaid shall be taken down in writing by the examiner, not ordinarily by question and answer, but in the form of a narrative, and when completed shall be read over to the witness, and signed by him in the presence of the parties, or such of them as may think fit to attend: provided always, that in case the witness shall refuse to sign the said depositions, then the examiner shall sign the same, and such examiner may, upon all examinations, state any special matter to the Court as he shall think fit: provided also, that it shall be in the discretion of the examiner to put down any particular question or answer, if there should appear any special reason for doing so; and any question or questions which may be objected to shall be noticed or referred to by the examiner in or upon the depositions, and he shall state his opinion thereon to the counsel, solicitors, or parties, and shall refer to such statement on the face of the depositions, but he shall not have power to decide upon the materiality or relevancy of any question or questions; and the Court shall have power to deal with the costs of immaterial or irrelevant depositions as may be just.

“ Sec. 33. If any person produced before any such examiner as a witness shall refuse to be sworn or to answer any lawful question put to him by the examiner, or by either of the parties, or by his or their counsel, solicitor, or agent, the same course shall be adopted with respect to such witness as is now pursued in the case of a witness produced for examination before an examiner of the said Court, upon written interrogatories, and refusing to be sworn, or to answer some lawful question: provided always, that

if any witness shall demur or object to any question or questions which may be put to him, the question or questions so put, and the demurrer or objection of the witness thereto, shall be taken down by the examiner, and transmitted by him to the Record Office of the said Court, to be there filed; and the validity of such demurrer or objection shall be decided by the Court; and the costs of and occasioned by such demurrer or objection shall be in the discretion of the Court."

We cannot help fearing that this new system will produce more profit to lawyers than to laymen, as it involves a departure from the great principle established by the abolition of the Masters, that a cause ought to be heard *throughout* by the same judge.

It has been surmised that the Chancery Bar, for want of experience in the examination of witnesses, are in danger of being superseded in the conduct of this branch of suits in Equity. But without adverting to the extreme difficulty of carrying on a suit piecemeal by different advisers, the distinction between Common Law and Equity proceedings has not been much regarded by the promoters of such views. In an action the issues are always defined by the pleadings; and the great questions and objections which arise upon relevancy and materiality, are discernible in a moment. But every such question and objection must, in an Equity suit, be drawn from a full knowledge of the record, which, however concise it may frequently be under the new order of things, will nevertheless still be in very many cases — and those the most important ones — a voluminous affair, until the rule is abandoned of requiring the pleader not only to set forth his case, but to indicate the evidence by which he means to support it. So long as that rule is in force, Equity records must and will be long; and the expense of placing papers before a counsel, who is a stranger to the cause, for the mere purpose of obtaining his assistance in taking the evidence, is one of very doubtful prudence or expediency, independently of the question whether such costs would be allowed on taxation.

But attendance at Quarter Sessions for the express purpose of acquiring a practical knowledge of the Law of

Evidence has long been habitual among the junior members of the Chancery Bar: and many members of that body have had considerable experience in the examination of witnesses in hotly contested cases before Committees of either House of Parliament. Our own observations likewise lead us to the conclusion that extreme skill in this branch of professional duty falls to the lot of very few men, even at the Common Law Bar: and that so far as regards the Chancery Bar, a man of fair judgment and competent knowledge of his case will not be found wanting in the performance of his duty to his client, even in this new department of Chancery procedure. No difficulties of this kind are suggested by the experienced solicitors, who gave such valuable assistance in stating their experience to the Commissioners. Mr. Weatherall's evidence is peculiarly strong in favour of oral examination of witnesses before the Judge in all cases of disputed fact. (*Report*, p. 237.)

IV. *Decrees.*

It was a well recognised rule in the by-gone times of the Court of Chancery, that the Court would not decide a cause upon a motion: and where the real or substantial issue of a suit was involved in an application of that sort, the motion was ordered to stand over till the hearing of the cause. In the days of Lord Eldon, when the hearing of a cause was almost a hopeless prospect, many speculative motions were made by the suitors in the hopes of eliciting from the judge an opinion, by which the main points in litigation might be adjusted without a further prosecution of the suit.

We are now, however, furnished with a process for obtaining a decree on motion; and in many simple cases we doubt not that it will be found extremely available. The Act 15 & 16 Vict. c. 86. thus develops the plan: —

“ Sec. 15. The plaintiff in any suit commenced by bill shall be at liberty, at any time after the time allowed to the defendant for answering the same shall have expired (but before replication), to move the Court, upon such notice as shall in that behalf be prescribed by any general order of the Lord Chancellor, for such decree or decretal order as he may think himself entitled to; and

the plaintiff and defendant respectively shall be at liberty to file affidavits in support of and in opposition to the motion so to be made, and to use the same on the hearing of such motion ; and if such motion shall be made after an answer filed in the cause, the answer shall, for the purposes of the motion, be treated as an affidavit.

“ Sec. 16. Upon any such motion for a decree or decretal order it shall be discretionary with the Court to grant or refuse the motion, or to make an order giving such directions for or with respect to the further prosecution of the suit as the circumstances of the case may require, and to make such order as to costs as it may think right.”

This new practice has probably been derived from the system of claims as introduced by Lord Cottenham : the decrees on claims being in his Lordship's General Orders of 1850 expressed to be taken *on motion*. Many vain formalities are thus avoided, and much expense is saved.

Another useful provision for expediting decrees consists in the abolition of the practice of sending cases to a Court of Law for the opinion of the Judges on legal questions arising out of Chancery suits, and in enabling the Court to decide upon legal titles and rights by its own inherent jurisdiction. The Act 15 & 16 Vict. c. 87. deals with this subject in two short sections : —

“ Sec. 61. It shall not be lawful for the said Court of Chancery, in any cause or matter, to direct a case to be stated for the opinion of any Court of Common Law, but the said Court of Chancery shall have full power to determine any questions of law, which in the judgment of the said Court of Chancery shall be necessary to be decided previously to the decision of the equitable question at issue between the parties.

“ Sec. 62. In cases where, according to the present practice of the Court of Chancery, such Court declines to grant equitable relief until the legal title or right of the party or parties seeking such relief shall have been established in a proceeding at Law, the said Court may itself determine such title or right without requiring the parties to proceed at Law to establish the same.”

Such cases, we trust, will never again disgrace the Court as *White v. Lisle* (3 Swanst. 342.), where, after two verdicts

for the defendant, Lord Eldon, not satisfied with this conclusion, sent the case again to Law for a third trial, with a similar result; or *Evans v. Prothero* (1 De Gex. Mac. & Gord. 372.), where, after two verdicts for the plaintiff respecting a small landed property purchased for 21*l.*, Lord Cottenham granted a third trial, in which the plaintiff again obtained a verdict; and Lord St. Leonard's was at last obliged to terminate the suit by overruling the opinion of Lord Cottenham on which the order for the third trial was grounded, and refusing an application by the defendant for a fourth trial, which the Vice-Chancellor Knight Bruce had already declined to grant.

"A case," says Mr. Pemberton Leigh, "will be in the memory of many members of the Commission, where Sir John Leach directed an issue on a will. The jury found in its favour. He was dissatisfied with the verdict, and directed a new trial, which ended in a second verdict for the will. He sent it back a third time, and declared that if twenty verdicts were found in favour of the will, he would not act upon them; and the case was compromised. The objection to the will being a mere technical objection founded on the Statute of Frauds, it is probable that twenty verdicts would have been found in favour of the will, and all contrary to law. It seems to me, either that the evidence should be given before the Judge whose mind is to be satisfied; or, that if the fact is to be tried before another tribunal, the finding of that other tribunal should be conclusive. My own opinion is in favour of the first alternative."—(*Report*, p. 249. *Evidence of the Right Hon. T. P. Leigh.*)

The scheme of printing the papers in a cause, according to the usage of the House of Lords, the Privy Council, and the Court of Session in Scotland, has been frequently advocated as an economical and convenient measure; and its adoption by the Legislature to the limited extent of requiring only the bill to be printed, is to us rather enigmatical. The experiment is thus deprived of a fair trial, and in case of failure, the blame is thrown upon the scheme in its full integrity, notwithstanding its very partial introduction into practice. We cannot find in the evidence taken before the Commissioners any sanction for such a fractional method of proceed-

ing: we are led to entertain misgivings as to the disposition which is thus evinced in reference to the improvement of Chancery procedure. We trust, however, that if the printed bill is found to be convenient and not too expensive, the time will not be far distant when the answers and evidence in Chancery suits will be printed throughout, so that the briefs may resemble those now in use in the highest Courts of Appeal. The new system is merely patchwork; but judging from the line of examination pursued by the Commissioners in prosecuting their inquiries on this subject, we are inclined to believe that their desires went beyond their recommendations, which are doubtless confined to the printing of the bill or claim alone. (See the evidence of H. Luke, Esq., and R. Bloxam, Esq.—*Report*, pp. 210. 216.)

The fusion of Law and Equity has received but little advancement under the recent Chancery alterations. We find, however, in the new Patent Act, 15 & 16 Vict. c. 83., a clause of great importance, which may be the germ of extensive additions to the jurisdiction of the Common Law Courts. The 42d section of this Act is in the following terms:—

“In any action in any of Her Majesty’s Superior Courts of Record at Westminster and in Dublin for the infringement of letters patent, it shall be lawful for the Court in which such action is pending, if the Court be then sitting, or if the Court be not sitting, then for a Judge of such Court, on the application of the plaintiff or defendant respectively, to make such order for an injunction, inspection, or account, and to give such direction respecting such action, injunction, inspection and account, and the proceedings therein respectively, as to such Court or Judge may seem fit.”

Nothing can be simpler than the remedy here afforded with reference to injunctions in one class of cases: and when we look at the extreme facility of applying the same rule to cases of copyright, manufactures, and designs, the precedent thus furnished is an irresistible argument for conferring upon the Courts of Common Law a jurisdiction commensurate with that which the Courts of Equity now exercise in every case of the actual or apprehended invasion of legal rights, and for

making the writ of injunction, when legal rights only are involved, a legal as well as an equitable remedy. We are prepared even to extinguish the jurisdiction of the Court of Chancery in such cases, and to give to the Courts of Common Law an exclusive jurisdiction to issue an injunction for the protection of legal rights.

It would be ungenerous to withhold from the Lord Chancellor a tribute of thanks for the labour which he must have bestowed upon the new statutes and orders that we have been considering. His influential position and his high representation render his authority on such subjects almost absolute: and whatever he undertakes in the way of reform will certainly encounter no impediment for want of power or resolution on his part. His Lordship is, beyond all doubt, a first-rate hand at construing deed, wills, and Acts of Parliament, and is, moreover, an accomplished forensic tactician. He has also had the great and rare glory of being Chancellor of Ireland, as well as of England. But we have yet to discover from the Reports of his decisions, or from his judicial bearing, that he is a great Master of Equity, or profoundly versed in the philosophy of jurisprudence—a Nottingham, a Hardwicke, or an Eldon.

On reviewing what has thus been achieved, we are convinced that, on the one hand, many evils and many mischievous practices have been quashed or checked by the new arrangements; but, on the other hand, a fertility of expedients for the multiplication of costs and for the creation of delay will always exist. Much confidence must still be reposed, therefore, in the right feelings and good sense of the practitioners of the Court and the watchful superintendence of the Bench. But even these are insufficient safeguards without the aid of a vigilant public press, to which we look for our best security against all relapses into the old vices of the Court.

The same Act contains a most useful provision in s. 48. for enabling the Court, in foreclosure suits, to decree a sale of the property, on the application of the parties, in lieu of a foreclosure. This has long been the practice in Ireland; and the want of this jurisdiction in England was often severely

felt. In carrying this new branch of the jurisdiction into exercise, the course of practice in the Irish Chancery will probably be much referred to; and the experience of the Lord Chancellor while presiding in that Court will on such occasions be of great value.

The same Act (s. 60.) remedies another important grievance, by which, without any one's fault, except perhaps that of the Lord Chancellor for the time being, the suitors were exposed to the delay and expense of rehearing their undecided causes before a new Lord Chancellor. Every Chancellor is now empowered to deliver judgment within six weeks after resigning the Great Seal, in all causes standing for judgment before him at the time of his retirement.

ART. XII. — THE INNS OF COURT — OXFORD
UNIVERSITY COMMISSION.

THE prospects of Legal Education are very gloomy, so far as the Inns of Court are concerned. So long as nothing was done, or attempted to be done, to remedy the astonishing state of things which depraved custom and inveterate spirit of obstruction had perpetuated in those learned societies, it was not unreasonable to hope that a tardy sense of broken trusts and misappropriated resources would force upon the Benchers a reform, the necessity of which it seems impossible to deny. These anticipations have not been wholly disappointed. Change there has been, but such change as affords little hope of substantial improvement, while it perplexes the subject with a multitude of details and alterations, and affords an endless, and we are afraid not wholly unwelcome or unforeseen, array of excuses and palliations. If the Inns of Court are accused of granting degrees, without satisfying themselves that the aspirants have any qualification for them, the answer is now ready, that an examination has been established; and it is easy to suppress the fact, that the examination is voluntary, and therefore in no respect tends to

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remedy the abuse complained of. So, if the lack of legal instruction be observed, it is easy to answer, that professors have been appointed, suppressing the truth that the persons selected are of little eminence, and that all candidates who showed a wish for Law Reform or improvement have been carefully excluded. The mass of mankind judges of things in the gross by a coarse and simple standard. In questions like these, which, however important, do not immediately affect the material interests of any large body of the public, to perplex their discussion, and render it intricate, is, in general, to secure the existing abuses in their tenure. Puzzle and command is the motto of such tacticians, and we sadly fear that the cause of Legal Education, to be carried on by the funds appropriated to its service, in what was once the University of the Common Law, must wait till some one shall arise who, taking a bold and comprehensive view of the whole subject, shall treat Legal Education, not as an isolated question, but as a part of the larger inquiry, one day to be instituted into the flagrant malversation and misappropriation of the large funds entrusted to the faithless hands of the Benchers of the Inns of Court.

Under these discouragements and uncertainties, we gladly hail any ray of light that breaks through the darkness, come it from what quarter it may. Chased by its official protectors from the University founded and endowed expressly for its development, the systematic and scientific study of the Law of England is not unlikely to find a resting-place on the classic banks of the Isis. The original of the Inns of Court is traceable to the devotion of the Clerical University of Oxford to the study of the Canon and the Civil in preference to the cultivation of the Common Law; and it may well be that that study, now so shamefully neglected in its appointed seat, may acquire new vigour and freshness by being transplanted into a field in many respects more congenial to its cultivation than the noisy and smoky purlieus of a great city. We rejoice to see that the University Commission advocates the restoration of the Vinerian Professorship of Common Law to a state of real efficiency, so as to give to the residents in the University the opportunity at

least of acquiring a knowledge of the principles of Law and Legislation. We make an extract from the Report:—

“ Mr. Bethell, in a speech delivered at the Law Reform Association, declares, that law students at present are rarely instructed in that liberal knowledge of jurisprudence and comprehensive system, which forms the basis of all law.

“ Mr. S. C. Denison, Deputy Judge Advocate General, has, in his evidence, given a detailed account of ‘ the usual routine of what is now called a legal education.’ He states that, for the most part, three years are spent in the chambers of eminent legal practitioners, where the student has daily opportunities of seeing business of the most important kind transacted; but that the opportunities thus afforded can be of little use to any but the most patient and industrious; and that even such students lose much of the profit they might derive, because they have not been taught the elements of legal science before they engage in the complex and difficult details of its practice. The disadvantages of such a system are manifest, even if the names of Lord Brougham, Lord Denman, and Mr. Baron Parke were not added, as approvers of Mr. Denison’s statement.”

“ (3.) It is admitted in the Report of the Law Amendment Society (Eighth Annual Address, p. 9.), that ‘ the great difficulty which has impeded the operations of the Committee in establishing a Law School has been the want of funds;’ that ‘ a Law School is necessarily a costly undertaking.’ But, at the Universities, the only cost will be an adequate salary to one efficient teacher.

“ (4.) It is proposed that, in London, the teaching should be gratuitous. ‘ The lecturer should be put to no expense. He may be willing to give his time, but no other demand should be made upon him.’—(*Ibid.*) But a system of gratuitous instruction in Law can scarcely be lasting, and will probably be worth very little while it lasts.

“ Many other objections to the above plan will readily suggest themselves. But even assuming that such a scheme were practicable, it does not make it at all less desirable that the elements of Law should be taught at the Universities. The two plans may co-exist without in the slightest degree interfering with each other. And this much seems clear—that if the tutorial system is practicable in London, it is so, *à fortiori*, at the Universities.

“ Every one, however, must be aware of the temptations, difficulties, and inconveniences, which beset the legal student at the beginning of his professional studies in London. Few greater benefits could be bestowed by the University than that of impart-

ing to him, within its quiet and regulated precincts, before he enters on his London career, that initiation into legal principles, which, if sought at all, is now sought and often missed amidst the various distractions of the Metropolis. But the study of the principles of jurisprudence, closely connected as they are with the principles of morals and politics, and necessary as they are for the study of history, ancient and modern, will be of more general use, than simply to prepare the minds of lawyers for the right discharge of their professional avocations. Future statesmen, and that important class of men who are to administer justice as magistrates, and to exercise great influence as landed proprietors, may reap much benefit from these studies, combined as they will be with history and political economy, according to the provisions already contained in the statute of 1850. Professors and teachers in this school, able and willing to do their duty, may attract many to the University, who now seek such knowledge elsewhere, or do not think of seeking it at all; and thus the University, if the subject be taken up zealously, will be enabled not only to raise its own character, but to render great service to the country." (Pp. 76. 78.)

The machinery recommended is extremely simple. All that the University has to do is to select a competent teacher, pay him well, and leave him to derive a further income from the contributions of his pupils. Law has already been made a subject of examination for honours. Here, then, we should have an adequate motive for exertion to the student from the examination, and a competent person to conduct the instruction,—things which we look for in vain in the present system of the Inns of Court.

We cannot doubt that such a change would be eminently beneficial to the tone and studies of the University. Oxford has hitherto been too much clerical, and too little national. Originally the University afforded instruction to her twenty or thirty thousand students in all the knowledge of the age, but gradually the clerical destination of the greater number of her graduates has warped the teaching of the place, and obliged every layman who goes to this celebrated University to go through a training especially devised for the formation of the intellect and character of a clergyman. It is a paradox, but it is nevertheless true, that this exclusive

devotion to ecclesiastical studies has not tended to a profound or scientific cultivation even of theology itself. Sciences require competition, as well as trades, and we believe that theology would be more profitably studied if, side by side with it in the same University, were established a profound and accurate school of jurisprudence. The practical spirit of Law might not be without a beneficial influence on those dreamy abstractions and metaphysical subtleties, in which modern theologians find a facile substitute for the laborious and extensive learning of the earlier divines of the English Church.

Nor would the clergyman act unwisely were he to include in his studies a knowledge of those laws and institutions which have played so conspicuous a part in our annals beyond those of any other State, and without a knowledge of which it is impossible really to understand our history, or the true spirit and tendency of our constitution. We cannot but think, had their early studies been less one-sided, we should have been saved from the spectacle of a clergy so frequently ranging themselves against public opinion, and denouncing as fatal and ruinous measures which experience has shown to be harmless and beneficial.

The time, we hope, will at last come when it will be a reproach to an English gentleman to know more of the laws of ancient states than of his own country, and when that knowledge will be obtainable, not through the medium of the dry technicalities of pleading or conveyancing, but from the exposition of the principles of the system illustrated in their most prominent applications, by an able, eloquent, and diligent lecturer. It is the fashion among those who receive and misapply the funds intended for legal education to assert, that Law can only be learnt analytically, by the preparation of legal documents, and never synthetically, by announcing the principles and then applying them. We believe that a union of both methods is better than either separately, but that synthesis ought to precede and accompany analysis. We would not send a pupil into a conveyancer's chambers till he had acquired a competent knowledge of the law of Real Property, nor to the chambers of a special pleader, or to an

equity draftsman, till he had a good preliminary view of the substantive law administered in Courts of Law and Equity, and had mastered, at any rate, the rudimentary principles of the Law of Evidence. This preliminary teaching not only smoothes many difficulties, but in a mind eager for information, and impatient of half knowledge, will invest the dry forms of a pleader's or conveyancer's chambers with an interest which those who approach the study of Law from the practical side can never know. This preliminary teaching could be well and sufficiently afforded at Oxford, and the man who left the University with a thorough knowledge of some very few elementary books of Law would gain an advantage in method and coherence over his competitors, for which years of desultory study would fail to compensate. It has been urged, that the business of the University should be to teach the general principles of jurisprudence, not the municipal law of this or any other country. This suggestion seems neither to agree with precedent nor reason. From its first institution, the University taught the Civil Law, the Code of Imperial, and the Canon Law, the Code of Papal, Rome, and since, the establishment of the Vinerian Professorship has added to these the study of the Common Law of England. To put aside all these positive studies, and to teach pupils ignorant of all codes of municipal law, by which all mankind have been governed, the general principles on which all Law should be framed as a branch of instruction distinct from ethics, would be to perplex the subject with refined and speculative distinctions, and to deprive it of all practical utility and significance. It will, moreover, require a considerable revolution in the feelings and principles of the University of Oxford before it sanctions lectures on such a work as Bentham's "*Morals of Legislation*,"—the best book, probably, which has appeared on this abstruse subject. The readiest school of jurisprudence is the comparison of existing laws, and the careful investigation of their effects; and those who would solve these problems by the contemplation of abstract principles, without application in the concrete, will gain nothing but vague truisms and unmeaning generalities.

Yet, while we thus advocate the teaching of the Common Law as a substantial part of University education, we by no means wish to imply that this would relieve the Inns of Court of the duty imposed on them by the trust, of which they are the faithless depositories. We have said that syncretical teaching ought not only to precede, but also to accompany, analytical investigation. The first part should be furnished by the Universities, the second by the Inns of Court; nor will the place where they are delivered be the only difference between these methods of instruction. The University Professor would presume no knowledge of Pleading or Practice in his pupils. He would deal with Constitutional Law, the historical parts of the law of Real Property, and the principles of Equity and Common Law, applied to contracts and wrongs in general. The Professor of the Inns of Court would presuppose more technical knowledge in his pupils, and, without abandoning scientific arrangement, and the logical deduction of one principle from another, would trench more nearly on the department of the practising lawyer. Blackstone would be the model for the University Professor, while the Lecturer of the Inns of Court might probably find his in the close and learned arguments by which the darker portions of our Law have been from time to time illustrated. We cannot sketch such an outline without a painful consciousness that we are far indeed from the time when it shall be filled up, but in the present gloomy prospects of Legal Education we are thankful for any aid, especially when received from so distinguished a body as the late Oxford Commission.

If any one should think we hold extreme opinions on this subject, we would bid him turn to the last Number of *Hansard* (vol. cxxii. p. 1877.), just published, in which he will find the following conversation reported to have taken place in the House of Lords on the 25th of June last:—

“ Lord Lyndhurst said, he wished to ask the Lord Chief Justice whether, as visitor of the Inns of Court, he was satisfied with the scheme of legal education which had been adopted by the Benchers of the Inns of Court ?

“ Lord Campbell said, he had always thought that the state of

legal education was disgracefully bad, and he rejoiced to see that something had at last been done which might lead to amendment. *He thought more might be done. He hoped that the Benchers would still go on*, that there might be the same opportunity of acquiring legal education in this country as in other civilised countries in the world.

"Lord Lyndhurst hoped that the system of education now to be adopted would not be left VOLUNTARY, *but that there would be A COMPULSORY EXAMINATION OF STUDENTS before they were called to the Bar.*

"Lord Brougham said, as a Benchers he was confident there was every disposition on the part of his brethren on the Bench to carry a good deal further than they had yet done the important business which they had commenced for the improvement of legal education. But he entirely agreed with his noble and learned friend, that if degrees were conferred as the result of studies in the different Inns, or in a University composed of the four Inns (which he thought would be the sounder system), *that these degrees should only be conferred after compulsory examination*; that was to say, that examination should be necessary for admission to the degree of a barrister, and that this degree should not be conferred EXCEPT AS THE RESULT OF EDUCATION IN THE INNS."

This, we think, is decisive. We are glad also to see, that in the "Edinburgh Review," just published, the portions¹ of the last "Annual Report" of the Law Amendment Society, condemnatory of the scheme of voluntary education just issued by the Benchers, is quoted with approbation. Legislative interference is now indeed certain to take place, as every one but the parties most concerned (who meet all objections with

¹ "Your Council hope and believe, that from the present Inns of Court will at length arise a complete and satisfactory Law University, endowed with the funds originally vested in the Societies for Legal Education, and which cannot be better devoted than to the purpose of teaching the Law. Nor can your Council entertain a doubt that, if the Benchers do not so apply these funds, their proper application will be enforced by the Legislature."—*Report*, 1852. And the Edinburgh Reviewer adds, "Lord Coke loved to have the Inns of Court called a Third University. It is time they did something to deserve that name. What a change in the learning of the great professions were Oxford and Cambridge really to take to teaching divinity to our future clergy, and the Temple and Lincoln's Inn to fulfilling the trust of watching with proper academical interest over the instruction and progress of their respective students!"

smiling self-sufficiency) must perceive. Nor do they see that they are being led to death by members of their own body.

“ Pleased to the last, they crop the flowery food,
And lick the hand just raised to shed their blood.”

ART. XIII.—FRENCH AFFAIRS AND JURISPRUDENCE.

WITH the political aspect of affairs among our neighbours we have not anything to do, except in so far as the administration of justice is concerned. But upon this, all that has lately happened must be allowed to have a bearing, more or less direct, beside the great interests of peace being, according to some opinions, seriously involved; and none have greater reason to pray that this may prove a groundless alarm than the friends of Law Amendment, whose cause, with that of all social progress, is gone as soon as the sword is unsheathed.

It may be assumed, as the result of the President's late appeal to the people in the southern and western provinces, that there has everywhere been seen the greatest official enthusiasm; that this was quite real in its substance, and only heightened in its exhibition by the spirit of adulation and the vanity of personal display; that the lower orders of the people (the ignorant peasantry especially) showed the same feelings, though in a very much less degree; while the better classes kept aloof, but were quite content to let the tide run unopposed which was to bear the chief of the state towards a change of his title rather than any alteration in his position. In some places, and particularly in the Bordelais, — the most Bourbon part, perhaps, of all France, — the feeling in his favour was much more general, and the warmth of his reception among the respectable classes more glowing. Whoever recollects the part acted by Bordeaux in the scenes of 1814 must regard this as exceedingly discreditable to that great community. But before we set it down to the account of national levity in excess, and the silly desire of outstripping the other towns of the south, where the most exaggerated

stories of the reception had been circulated by the press — the gagged and the prompted press, — we must not be too confident in denying that a good deal of royalist feeling mixed itself with the motives of the Bordelais, who may very well have preferred any despotism to that of the mob, and preferred to anarchy any return towards monarchical government. We have mentioned the manufactured narratives of the progress; and to be sure, when every newspaper exposed itself to the process of warning by venturing to mention anything which might displease not merely a minister, but a fawning prefect, no reliance can be placed upon the silence of all but the official journals, nor upon the fulsome trash with which these overflowed. But it turned out that some of them had their accounts written before the event; and one actually gave a flowery description of the proceedings at Tholouse, unfortunately including that of the mock fight, which had been announced, but was afterwards countermanded. It is a very common error in France to suppose that the multitudes who were gathered together on all parts of the progress were an indication of the interest taken by the people in the President and his proceedings. The very great majority were only moved by the love of the show, and by that curiosity to see a person whom all men were talking about. But it is an error fully as common in England, to fancy that these feelings are peculiarly French, and to look down upon our neighbours as we on all occasions so readily do. There was nothing half so senseless in the curiosity to see the President as in our own countrymen's crowding the roads to catch a look of George IV. when, in 1820, he changed his name from Regent to King. The week before, and for eight years, he had possessed every one attribute of King, saving the name, and no one went across the street, nay, turned his head to see him. His title was changed, and for a few days the way was crowded with spectators. A few months passed, and he became the object of execration, and ventured not to appear. A few months more, and all was forgotten; and in one part of his dominions he was received with more vehement expressions (at least) of affection than the President in any part of France; and the papers of those parts were to the full as extravagant in their

descriptions as any of the enslaved journals of Paris. Among the official parasites of the South, one of whom, formerly a St. Simonian, invested him with the glories of Charlemagne as well as the Emperor, it cannot be found that any one went so far as to begin a subscription for building him a palace, or that his rabble followers plunged into the water to enjoy the honour of bearing him ashore on their backs. Nor is this the only instance in which the conduct of our countrymen, even in other parts of the United Kingdom, has been such as to preclude them from too sternly reproving the extravagant and unreflecting proceedings of their foreign neighbours.

It is fit that we call to our recollection these passages, in order to allay the undue ferment of national pride: yet we are bound to add that no one can for a moment picture to himself any degree of national alarm which could ever make the people of England submit to the entire loss of liberty, and see no other means of safety from the lawless tyranny of the mob then seeking refuge in more than Oriental despotism. If the atrocious crimes of 1793—94 covered with ever-enduring disgrace the nation so devoid of all moral courage as to suffer them, it should seem that it has not at the present day recovered much of this virtue, when a dread of seeing the same enormities repeated, lays it prostrate before whoever will at any premium insure against such a risk.

It is, however, quite certain that, after making every allowance for the circumstances to which we have referred, there has been a demonstration, and an acquiescence, quite sufficient to justify the President in affirming that the intended renewal of the Empire has the assent of the country, and in expecting that this will be more favourably given by the votes upon that or indeed upon whatever proposition he may submit to the people.

The destruction of every thing like constitutional government was attended, as we had occasion to show in our Number for last May¹, with a great inroad upon the independence of the judicial office — the decree which placed the

¹ L. R. xxxi. p. 151.

retirement of nearly two hundred Judges at the President's disposal, enabling him either to retain them on the Bench subject to dismissal, or to remove them at once, and appoint successors on whose favourable disposition he could rely. The subsequent proceedings on the Orleans' confiscation showed most praiseworthy independence in the Paris Courts, but their voice in behalf of law and justice was overruled by the decision of the Council, a body of paid and removable officers, who, to the general surprise, only reversed by the narrowest possible majority the decision of the regular tribunal. It is unlikely that any further attempts will now be made against the ordinary proceedings of the Courts, or any further encroachment made upon the existing law under which the Judges hold their offices. But the independence of those functionaries in the provinces cannot be implicitly trusted when we see the forward zeal with which they flocked to meet the President on his progress; many of the same Judges willingly attending him who had formerly stood aloof from all solemnities connected with the government overthrown by the fatal events of 1848.

It is impossible to make mention of that event without awarding to the President the praise so justly his due for the contrast which his most recent act affords to the unjustifiable conduct of the constitutional ministers—their breach of faith with Abd-el-Kadir. It is an act deserving the greater commendation, because it is only calculated to please the comparatively small number of reflecting and right-thinking men, and is pretty sure to be viewed unfavourably by the great majority of the French people, even by the bulk of their political men.

We are even entitled to form some expectation of further good measures, and on a larger scale, as the result of the consolidation which the new title may give to his power. We do not merely refer to an amnesty; we mean some relaxation of the absolute power now vested in the executive, some return to constitutional government—the union of the rigour required to control faction, with some portion of free discussion in the public bodies, is undoubtedly exceedingly

difficult ; but we may not perhaps be authorised, until the experiment shall be tried, to pronounce it impossible.

That great improvements may be made in everything relating to Jurisprudence and Judicial Procedure no doubt whatever can be entertained. Often as we have dwelt on the radical vices of the French system, we must once more urge the topic at a time when more trials are about to take place which must bring their glaring defects into view. The conspirators, for example, charged with contriving the atrocious Marseilles assassination and wholesale murder, are, by a very wise arrangement, about to be tried by the ordinary Courts, and not by any higher tribunal. We shall then once more find the various prisoners compelled to answer questions touching their own guilt, — the deposition of one received as evidence against the others, — the hearsay collected by policemen, not only from persons who pretend to have some knowledge on the subject, and who are not called to testify and be cross-examined, but from persons who pretend not to know any thing, and only give their conjectures, and the rumours prevailing in their neighbourhood. As fortunately no attempt was made, nor any blood spilt, we shall have no example of the greatest of all absurdities, the conviction with extenuating circumstances, no repetition of such marvellous folly as declaring the crime of murder to be extenuated by the sordid motive which was an aggravation, if of such guilt aggravation be possible.

But the light in which it most concerns all friends of improvement to regard the new Empire, is its tendency to keep or to break the peace of Europe. And here the late strong declarations of the President are not to be laid out of view, though certainly not implicitly trusted even as regards his own present intentions and future designs, and still less can those be trusted by whom he is surrounded, and above all the military body, and, we fear, it must be added, the military propensities of the French nation. There is nothing in this risk peculiar to the President and the others now at the head of affairs. The fall of Louis Philippe was to the cause of peace an irreparable loss ; the exclusion of his family, we fear, cannot be so regarded, as far as personal character is involved

in the question, or any consideration but the loss of parliamentary government—the best pledge of peace; for there are notoriously among the Orleans princes those, and not the least prominent, whose opinions and passions are as hostile to the repose of the world as those of any, the most unprincipled, soldiers by whom the President is surrounded. But we may rely for our security against the worst of calamities upon the general determination of all Europe to make common cause, against French aggression, with the first State that may be assailed, and the general state of preparation which has become more than ever the duty of all Powers, even those protected by their remoteness or by their insulated position.

ART. XIV.—THE PROPOSED CONFERENCE ON THE ASSIMILATION OF COMMERCIAL LAW.

AT the commencement of our labours in November, 1844, we endeavoured to give a general view of the whole subject which we undertook, and we then proposed not only certain great alterations in the Law, but directed attention to many minor points. We may at some future period advert to this general statement of our objects and principles: at present we shall only refer to one which we have ever kept in view, and have lost no opportunity of bringing before our readers. We refer to CODIFICATION. “The most effectual of all provisions for the promulgation of the Law is the digest of the Law into a Code, or written body, correctly arranged, clearly expressed, and thus accessible to all who are called upon to comply with its enactments.” (1 L. R. p. 8.)

This great question has certainly made advances within the last eight years, and we now look forward to its future progress with much hope and expectation. As has often happened in the history of similar undertakings, the proposal of a major has carried the minor proposition, and we believe that

the discussion of an International Commercial Code has helped on, in the public mind, a conviction that a Commercial Code for our own country was at all events desirable. To the merit of the former project Mr. Leone Levi is chiefly entitled, and we have several times¹ alluded to it. But out of its discussion has arisen a proposition more limited, but certainly more practicable, and altogether more entitled to favour, not only on its own account, but as an important step towards the accomplishment of the larger proposal. This will be seen by tracing shortly the steps which the Law Amendment Society has taken in this matter.

At a public meeting held on June 18. 1851, at 21. Regent Street, called by this body, it was moved by the Earl of Harrowby, and seconded by Mr. Ewart, M.P., and carried unanimously, "That an International Commercial Code would be highly desirable, and that this meeting fully approves of the steps which have been taken to promote this object."

The steps here alluded to were the appointment of a Committee to consider the subject, which, after several meetings, came to the opinion that means should be employed to assimilate the commercial laws of the three countries; and we find the following allusion to this subject in the Annual Report of the Society, adopted in 1852, which appears to have attracted more attention than any former Report:—

"The interest in the objects of our Society which our treasurer found to exist in different parts of Scotland, which he visited last autumn, is evidence of a wide-spread feeling of sympathy and concurrence of opinion, which under good arrangements may serve to create for us powerful auxiliaries."

This passage in the Report alludes to certain proceedings taken on behalf of the Society in the autumn of 1851, of which we have already given some account in a previous volume.² A Society was then formed in Glasgow called "The Glasgow and West of Scotland Law Amendment Society in connection with the London Society," one of the

¹ 13 L. R. p. 383.; 16 L. R. p. 393.

² 15 L. R. p. 204., November, 1851, Art. "Law Amendment in Scotland."

express objects of which was to assimilate the Commercial Laws of England and Scotland, and certain proceedings were held at Perth, Dundee, and Aberdeen, in the same direction. In a printed Report of a Special Committee of the Town Council of Aberdeen, now before us, it is said:—

“A deputation of the Society is at present in Scotland for the purpose of communicating with the various public bodies here as to the best means of assimilating the laws of England and Scotland. And one of their number, Mr. John Gilmour, Barrister-at-law, who lately visited Aberdeen, addressed a letter to the Lord Provost, drawing the attention of the Town Council to the subject, and pointing out by way of illustration a few of the conflicts which exist in the Law of Debtor and Creditor in the two countries, and of their embarrassing consequences;” and the Committee concluded by “respectfully recommending that the Council appoint a Committee with instructions to put themselves in communication with the leading men of business in Aberdeen and other towns, and to co-operate with other public bodies in Scotland, in forming associations, *in connection with the Society in London*, for the purpose of promoting the amendment and assimilation of the laws of the two countries.”

The Appendix to this Report contains also some account of the proceedings of the Dundee Town Council, in which the Provost “referred to a Society which had been formed in London for the Amendment of the Law, and particularly for the purpose of *assimilating the Law of Scotland* with that of England. A deputation from the Society was at present in Scotland, and he (the Provost) had a call from Mr. Gilmour, a barrister in London, and one of the deputation.” And another speaker, Mr. Anderson, says,—

“The object of the deputation was to form branches of ‘the Society for Promoting the Amendment of the Law in different towns, the object of which Mr. Gilmour had explained in a letter to the Lord Provost of Aberdeen.’ And in the Aberdeen Town Council proceedings, also given in this Appendix, the Provost alludes to ‘a very able statement, drawn out by Mr. Gilmour, who has been deputed by the Society in London for Promoting the Amendment of the Law to visit Scotland.’”

All these proceedings show that considerable interest was

excited in Scotland on the subject of the Assimilation of Laws ; and they justified the Council in making the following statement in their Report. In proposing " a comprehensive digest, consolidation, and codification of the whole Statute and Common Law," they say : — " If there be any part of it which more calls for it than another, it is, perhaps, the Commercial Law, as to which some steps have been taken, and as to which a great interest has been expressed as well in Scotland as in England by many important commercial bodies and meetings." And we shall not be surprised that at the meeting at which this Report was read it was moved by the Earl of Harrowby, and seconded by Mr. William Hawes, — " That steps should be taken for the consolidation of the Statute and Common Law of this country," or that this resolution should be carried unanimously.

In our last Number (August, Art. IX.), we alluded to some of the steps which, in pursuance of this resolution, were about to be taken by the Society in this matter ; and we refer to this Article for the purpose of correcting a slight error which we made in it. We there printed a letter signed by Lord Harrowby, as chairman of the committee appointed to consider the object of the Assimilation of the Commercial Law of England, Scotland, and Ireland, and we then stated that " this letter has already been heartily responded to wherever it has been sent ;" the fact being that it had not been then regularly sent by the Committee, but only personally communicated.

It has been since regularly issued by the Committee, and it may be convenient here to reprint it : —

" Society for Promoting the Amendment of the Law,

" 21. Regent Street, October 6th. 1852.

" Sir,—The Committee of this Society appointed to consider the subject of the Assimilation of the Commercial Law of England, Scotland, and Ireland have received a circular letter from the Edinburgh Committee for the Amendment and Consolidation of Commercial Law, containing a suggestion for holding a General Meeting of deputations of all chambers of commerce and other societies, to consider the amendment and consolidation of Commercial Law ; and they have resolved, after mature consideration, that

it would be desirable to hold a conference of deputations of town councils, chambers of commerce, and public bodies, in London, on the 16th of November next, to consider this important object.

"I shall therefore be obliged by your informing me whether it will be convenient for a deputation from you to attend such general meeting. After receipt of your reply, more detailed information will be forwarded to you.

"I am, Sir, your obedient servant,

"HARROWBY,

"Chairman of the Committee."

A similar letter has been issued to various distinguished individuals, and we are in a condition to state that both letters have been most cordially responded to, and that deputations from many public bodies have agreed to attend.

The following chambers of commerce will send deputations which we give without much regard to due order —

Edinburgh.

Dublin.

Belfast.

Dover.

Liverpool.

Hull.

Bradford.

Leeds.

Manchester.

Glasgow.

Worcester.

Southampton.

Cork (to be represented by its members, who will be requested to attend).

Besides these, many peers, members of Parliament, and other eminent persons, of all political parties, have expressed their cordial approbation of the object, and declared their intention of being present. Lord Brougham, the President of the Society, will preside.

The following Societies will also be represented: —

Incorporated Law Society.

Metropolitan and Provincial Law Association.

Manchester Law Society.

Bath Commercial and Literary Institution (by the Mayor and four others).

Aylesbury Literary Association.

The City of London will be represented by the Lord Mayor (Mr. Alderman Challis, M.P.), the Sheriffs, and Mr. Alderman Copeland, M.P.

Some of the Foreign Ambassadors will also be present as friendly to the movement. They will probably on this occasion be represented by M. Van de Weyer, the Belgian Minister.

But as what we write must necessarily be imperfect, as well as to the attendance of individuals as the representation of public bodies, it may be sufficient to say that enough has been done to satisfy us that a most interesting, influential, and important meeting will take place on the 16th of November. It is the first time, so far as we are aware, that the public has shown an interest in the question of scientific Law Reform which is involved in CODIFICATION, and we believe that the first stone of a great national edifice is very shortly to be laid.

POSTSCRIPT.

PARLIAMENT is now about to meet — more disposed, we fear, for party conflict than for the cool and calm discussion of the necessary measures for the Amendment of the Law. There are some subjects, however, which must come before the public, and which they must soon decide. The most prominent, and certainly not the least interesting, of these is the recasting the Profession itself. The Profession has now, perhaps, done enough, and it is for the public to express some opinion, or to take the remedy of any existing evil into its own hands. We do not think the junior Bar will let the matter rest, even if they were not forced on to some action on the subject by the more active among the attornies, who either in London or the provinces will gall the kibe of the Bar. This restless spirit in both classes will, in fact, be heard, and will break forth in complaint. On two points we shall, if we mistake not, soon hear that etiquette exists no longer. The Barrister is not unlikely to take the advice of the great sage who has condescended to give his opinion on this subject as to the practice in the County Courts¹; still less, perhaps, can there be any doubt as to advising the conveyancing public as to transacting directly the whole business relating to dealings in land and other property; as the machinery for completing such transactions is fully as available to the barrister as to the attorney.²

The only objections that we can conceive to such a course (except those raised by fear, envy, prejudice, or interest,) would be a

¹ See *anté*, Art. V.

² See *anté*, Art. II.

doubt as to its effect on attorneys, which might occur to a humane man. But we think they may reasonably be left to care of themselves and their own interests. Many are competent to undertake any kind of business, and doubtless retain it; but the public would gain by the competition, and can think of nothing that would so effectually tend to restore THE CLIENT his rights, and to rid the land of the incubus now sits on it in the shape of professional charges, as reverting the practice of the GOLDEN age of conveyancing. If the attorney was, however, worsted in the race, he would have only to throw those blind guides who have made his name synonymous with that of an Anti-Law Reformer: who have either combined, as we have seen, to deprive others of their just rights, and to oppress and injure those who have devoted themselves to the amendment of the Law, or who have formed associations with the view of turning the Law Reform cry to the peculiar advantage of their own. As it is, we believe that the public will soon settle this question for themselves; as evidence of which we may refer to the Report of the Liverpool Chamber of Commerce for 1852.

Among "the leading grievances under which the trading classes now labour in respect of the attainment of Civil Justice," the Report refers to "the greatly increased expense hourly arising from the employment of *two sets* of practitioners, viz., the county attorney and his London agent," and "the rules of etiquette among the Profession; which, in various ways, entail an expense upon the suitors too often equalling, and not unfrequently exceeding, the amount at stake."

All that we can say is, that if these rules of etiquette prevail hardly upon the trading classes, they and the Bar have the remedy in their own hands. We wish it to be distinctly understood that we do not represent on this subject any portion or section of the profession. The client is alone to be considered. It is a well worth noting, as bearing on this point, that it has been ascertained that in eight-ninths of the cases in the County Courts the parties have no professional adviser at all. This seems to open a wide field for the services of junior members both Bar and Attornies.

Besides the Law Reform measures which have been adverted to in a preceding part of this Number, as likely to engage the attention of the new Parliament, we may now mention one or two more. We believe that Mr. Henry Drummond will introduce a Bill to facilitate the Transfer of Real Property, which will propose district registering of deeds relating to land. We are not able

enter into the details of this measure, but it will be the result of a most careful consideration of the whole subject, and will, if we are not mistaken, obtain the support, not only of the landowner, but of that part of the Profession, now a very large majority, who consider that some great reforms should take place on this subject. In connection with this subject, we have also heard that it is the intention of Government to introduce a measure as regards Ireland, to confer a parliamentary title on all lands sold passing through the Court of Chancery; a measure which, unless that Court be first greatly simplified and reformed, will hardly be considered as a boon to the land. But this being done, the rest might follow: and perhaps a foundation for some plan for shortening and simplifying titles is laid in the clause of the Act of last Session, which authorises the appointment of a body of standing conveyancers to assist the Court of Chancery; a power which has been very judiciously exercised by the Lord Chancellor.

A Bill for the reform of the Ecclesiastical Courts, to be introduced by the Government, is more certain than the other rumours; and as to this we are glad to know that they will be assisted by the deliberations of the Law Amendment Society, which has appointed a Committee on the subject. With reference to these subjects generally, it is useful to bear in mind the following extract from a recent letter of Lord Brougham:—

“The various measures which I have at different times brought forward (and of which a very few only have been carried) are not separated or insulated. They almost all proceed upon one view—the same in which your present city proceedings originate, the design of making our law, and above all our procedure, intelligible and natural, instead of obscure and technical; thus removing the complaints of speculative men, as Mr. Bentham, practical men, as Lord Denman. Such was my aim in the measures respecting Libel Law, Local Courts, Facilities of Conveyancing, Law Digest, Public Prosecutor, Declaratory Action, Arbitration, Reconciliation, Law of Evidence, and many others.”—*Letter to Mr. F. Lyne*, 25th August, 1851; published by that gentleman 5th Sept. 1851.

These various changes, and rumours of changes, have forced from one of our correspondents the following imitation of a part of Milton's Christmas Hymn, which we indulge him by printing, giving the original in a note.

STANZAS

SUGGESTED BY SOME RECENT AND PROPOSED LAW REFORMS.

[*Imitated from Milton.*] ¹

I.

The oracles are dumb ;
 No sham or hideous hum-
 bugging plea is filed in words deceiving ;
 Chicanery from his shrine
 Can no more divine,
 With hollow voice, the walk of King's Bench leaving.
 To weave the tricky web no midnight oil
 Is now consumed by pale-eyed pleader in his moil.

¹ We subjoin the original verses, XIX.—XXV., from the "Christmas Hymn":—

The oracles are dumb ;
 No voice or hideous hum
 Runs through the arched roof in words deceiving ;
 Apollo from his shrine
 Can no more divine
 With hollow shriek the steep of Delphos leaving.
 No nightly trance or breathed spell
 Inspires the pale-eyed priest from the prophetic cell.

The lonely mountains o'er,
 And the resounding shore,
 A voice of weeping heard, and loud lament ;
 From haunted spring, and dale
 Edg'd with poplar pale,
 The parting Genius is with sighing sent ;
 With flow'r-inwoven tresses torn,
 The Nymphs in twilight shade of tangled thickets mourn.

In consecrated earth,
 And on the holy hearth,
 The Lars and Lemures moan with midnight plaint ;
 In urns, and altars round;
 A drear and dying sound
 Affrights the Flamens at their service quaint ;
 And the chill marble seems to sweat,
 While each peculiar pow'r foregoes his wonted seat.

Peor and Baälím
 Forsake their temples dim,
 With that twice batter'd God of Palestine,
 And moonèd Ashtaroth,
 Heaven's queen and mother both,
 Now sits not girt with tapers' holy shrine ;
 The Libyck Hammon shrinks his horn,
 In vain the Tyrian maids their wounded Thammuz mourn.

And sullen Moloch fled,
 Hath left in shadows dread
 His burning idol all of blackest hue ;
 In vain with cymbals ring
 They call the grisly king,
 In dismal dance about the furnace blue :

II.

The lonely Temples o'er,
 And the resounding shore,
 The mammon-lovers weep and loud lament ;
 From building, court, and lane,
 Most fiercely they complain :
 With flour inwoven tresses torn,
 The clerks in twilight shade of Tanfield thickets mourn.

III.

See Gray's and Lincoln's Inn,
 See Chancery Lane's great In-
 stitution mourns with midnight plaint.
 In halls and tables round,
 A drear and solemn sound
 Affrights the BENCHMANS at their 'ceedings quaint;
 And the Stone Building seems to sweat,
 The Terminus¹ club, both old and new, begins its breast to beat.

IV.

The Bore and Baälim
 Forsake the Temples dim ;
 Dies the thrice-batter'd Court of Chancery.
 And Judges nothing loth,
 The Law and Equity both,
 Decree, ungirt with hopeless misery ;
 Vice-Chancellors refer no more to Horne,
 In vain the faithful Does their wounded Richards mourn.

V.

Dispensed with MASTERS fled,
 And left unheard, unread,

The brutish gods of Nile as fast,
 Isis, and Orus, and the dog Anubis, haste.
 Nor is Osiris seen
 In Memphian grove or green,
 Trampling the unshower'd grass with lowings loud :
 Nor can he be at rest
 Within his sacred chest ;
 Nought but profoundest hell can be his shroud ;
 In vain with timbrell'd anthems dark,
 The sable-stoled sorcerers bear his worshipp'd ark.

¹ This club was established on the passing of the Act for rendering the assignment of term unnecessary (8 & 9 Vict. c. 112.), and was called after the god Terminus.

Huge piles of papers, all of blackest hue;
In vain with curses dark
They ply the Masters' Clerk
With states of facts, tied up with tape so red:
The Masters all have gone, and now,
The Judge works out his own decrees in old Southampton Row.

VI.

The Attorney's no more seen
In Gray's or Lincoln's Inn,
Trampling, with laughter loud, the unpaid Bar;
Nor can he set at rest
Counting his sacred chest,
Nought but immediate payment is at all allowed.
Direct to Counsel, Client now resorts,
No more th' Attorney's car the harnessed Bar support.

VII.

They feel throughout the land
The dread SOCIETY's hand,
The rays of Science blind their dusky ey'n;
Nor all the trash beside
Longer dare abide;
No abstracts for twice thirty years unfold their snaky twine;
Our BAND, to prove their name is true,
Do by their various REPORTS control the learned crew.

VIII.¹

So when the sun in bed,
Curtained with cloudy red,
Pillows his chin on an orient wave,
The flocking shadows pale
Troop to the infernal jail,
Each fettered ghost slips to his several grave;
And the yellow-skirted FAYES
Fly after the night-steeds, leaving their moon-lov'd mase.

IX.

Yea, truth and justice then,
Will down return to men,
Orb'd in a rainbow, and like glories wearing,
Mercy will sit between,
Thron'd in celestial sheen,
With radiant feet the tissued clouds down steering;
And Heaven, as at some festival,
Will open wide the gates of her high palace Hall.

¹ It need not be observed that stanzas VIII. IX. and X. remain as in the original, being XV. and XVIII. of the Hymn.

x.

And then at last our bliss
 Full and perfect is,
 But now begins, for from this happy day,
 Th' old DRAGON¹ under ground
 In straiter limits bound,
 Not half so far casts his usurped sway,
 And wroth to see his kingdom fail,
 Swings the scaly horror of his folded tail.

Much attention has recently been excited by accidents on railways, and the means of their prevention. It may be useful to bring before our readers a Paper on this point printed in the *Times* of the 2nd September last, which, we know, comes from a high authority. Perhaps when there is so much desire expressed for an assimilation of laws in all parts of the kingdom, we might here usefully take a hint from Scotland.

"In Scotland persons are tried for culpable or reckless neglect of duty, by which the lives of the subjects are endangered or any passengers injured, and the trials have produced great benefit in increased attention to the safety of the passengers. It is believed that in England no such charge is competent; at least, no trials on such a charge take place. In Scotland the public prosecutor has powers and means of investigation of the most unlimited kind, by the magistrate compelling the production of every book and document which is necessary to see with whom blame lies. In the case of a death in 1845, the superintendent of one Scotch railway was tried and convicted and severely punished, as well as the engine driver, — the one for coming out and the other for going on with an engine known to both to be insufficient, and which the *books* proved had been treated as such for some time. In that case the representations of the superintendent to the directors as to the insufficiency of many of the engines were recorded and produced; and the directors were warned by the Lord-Advocate and the Bench, that if another accident occurred from that cause with any of the engines then in use, *they* would be tried criminally. The effect on that line had been most marked and decided in the additional number and improved character of the engines."

We have now exhausted our budget, and we may conclude by observing that we look forward to the approaching CONFERENCE, to which we have directed an Article, as a proof that there is a general desire to approach the subject of Law Reform in a conciliatory spirit. We think we see symptoms of a change of feeling in quarters where we have hitherto least expected it; but where we are most anxious that such good feeling should exist: to which we trust we heartily respond.

Oct. 28. 1852.

¹ Our friend, the author of the *New Pilgrim's Progress*, has evidently this Dragon in view when he described the Dragon FEUDALITY. See 6 L. R. p. 299.

THE
LAW REVIEW.

ART. I.—CIVIL PROCEDURE IN ENGLAND, AMERICA,
AND SCOTLAND, COLLATED.

A Travelling Opinion. By a Colonial Crown Lawyer.

A VENERATED Judge, in a recent admirable work, thus characterises the Jurisprudence of Scotland.¹

“ The law itself is not much upheld by the dim mysteries which are said elsewhere to be necessary in order to save law from vulgar familiarity. With a little deduction on account of the feudality that naturally adheres to real property, it is perhaps the best and the simplest legal system in Europe.

“ It is deeply founded in practical reason, aided by that conjoined equity, which is equity to the world as well as to lawyers. There can be no more striking testimony to its excellence than the fact, that most of the modern improvements in English Law, on matters already settled in the Law of Scotland, have amounted in substance to the unacknowledged introduction of the Scotch system.”

On this appropriate text it is proposed to offer a passing commentary. After upwards of a dozen years devoted to professional and public avocations in a colony, the writer has had the advantage to revisit America and this country at the time of the discussion and first operation of the most extensive and effective measures of Law Reform of the century. Anticipating that he may be called in the course of duty to assist in applying these important ameliorations elsewhere, his attention is naturally arrested by every thing that appears

¹ Lord Cockburn's *Life of Jeffrey*, vol. i. p. 85.

on the subject. Finding considerable interest taken, by the public at large, in a variety of proposed amendments in jurisdiction and procedure in Scotland, especially in the Local Courts, and viewing these questions with a disinterested though not indifferent eye, he is actuated not less by a due appreciation of the substantial excellences of the legal institutions of that country, than by a perception of some "amendable points" which remain still to be rectified; and as recent legislation, though greatly derived from Scottish sources, has been accelerated far beyond the original impulse; insomuch that Scotland may now in her turn participate in the benefit of assimilation, it has appeared a fitting time to review the subject connectedly, and with a comparative relation to the last improvements in each respective system. An opportunity of usefulness thus suggesting itself, which he conceives ought not to be neglected, he has not shrunk from attempting the task even under the restraints of bad health, frequent change of place, and the absence of all usual facility of reference, and he relies on the indulgence of candour and liberality to forgive all faults in a performance ventured with such motives, and for such purposes, by one who perhaps may now be deemed a "Stranger to the Record."

At the era of "The Great Exhibition" there was a rumour of a suggestion for a Congress of Lawyers of various nations to digest a Universal Code. At first announcement, the idea may appear chimerical, and undoubtedly many difficulties would present themselves to the perfection of such a work, which would only achieve its reception after a long lapse of time, and by much mutual concession. Perhaps also under all circumstances, there must remain certain local laws, "racy of the soil," from the advantages they confer, that are circumstantial and peculiar to the sphere of their operation.

The traditional forms applicable to property in land have been pronounced of this class; although, considering the universal prevalence of the feudal system in Europe, it would appear only to require an investigation into the historical changes which each country has undergone, and the modifications introduced by each on the gradual departure or

abolition of that system, to adopt a real property code to the requirements of the age, capable of extension in most material relations to all civilised states. But, however this may be, the same obstructions have not to be encountered in that large field of jurisprudence which respects Contract. Here the principles are founded in nature itself, apart from institution, and as ethics and morality are one and universal, so all positive law, with more or less admixture of accessory qualities in each particular case, will be found to derive itself from the *lex una et sempiterna* of human duty. As the intercourse of nations is increased, local distinctions will disappear, and in their mutual transactions even the symbols employed will assimilate. Thus the Mercantile Law partakes less than any other of the influence of local circumstances, and is more than any other susceptible of general acceptance and application. The same *Lex Mercatoria* ought to prevail in all trading places, and in the determinations of all mercantile and maritime tribunals the same dicta of jurists may be received with implicit deference, not as due to enactment or state authority, but as enforced by reason and common sense.

It is of the utmost importance to harmony and intercourse, that this mutual ground of general agreement should be extended, and that while all advantages of individual countries should be adopted so far as they can confer benefit on others, there should, at the same time, be a relinquishment of what is merely historical and peculiar, so far as it may stand in the way of assimilation. Let the best be selected from each, and what is prejudicial in each abolished without remorse.

To instance intestate succession to land: no amount of compromise perhaps would go to induce the English lawyer to abandon primogeniture, or the American equal distribution, while jurists, more moderate, would seek to reconcile the best ends of both by giving to the firstborn, or favoured heir, "One portion above his brethren" in their inheritance, with powers of administration and preemption.¹ In such

¹ The laws of Denmark are understood to have very equitable provisions on this head.

cases, the policy of the State and framework of Society forbid innovation; and there will accordingly always be a large region beyond the reach of mutual concession. Such may be designated the by-paths of the law, which chiefly concern the territory itself, and may, with less disadvantage, be left to the care of those whose interests are more exclusively affected. But in the great main lines of communication a wider scope has to be taken; and where external relations and mutual rights and benefits with our neighbours are at stake, a fair reciprocity would seem to dictate that every obstruction, that is not rendered necessary by decided local advantage, should be removed, and every facility afforded to commerce and free intercourse. Yet much remains to be done. It is anomalous to find that in a matter so vital to trade as the Law of Sale, there should exist, even to this day, distinctions as to the effect of delivery in passing the property under the contract. England, America, and France assimilating on one side, Scotland and Holland on another, with minor differences in each.

Of all obstacles to this good accord among States, perhaps none are more perplexing, and at the same time none more deserve to be extirpated or smoothed away, than such as are imposed by the defective constitution of the tribunals, and the technical forms in the administration of the law. Even where general policy, and the principles of jurisprudence, are one and the same, difficulties of the kind now adverted to will spring up to prevent assimilation.

Of such may be classed the distinction between Law and Equity, which, within England itself, has reared up separate systems of determining and enforcing right. And of such, also, those peculiarities in the classification and nomenclature of actions and formula of Procedure, by the adherence to which a great part of the Judicial Reports of each portion of the United Kingdom are lost to the other, or are read like a foreign language.

As regards Law and Equity indeed, it is maintained by "the Separatists," that the distinction is not artificial, but founded in the nature of things: and they appeal to its existence in that legal system, towards the perfecting of

which more learning and experience were employed than in any other,—the Civil Law,—as evidencing the acknowledged necessity of distinct administration. But Prætorian Equity was in truth the fruit not of natural necessity, but of artifice, — a graft, — the slow growth of time, — upon the Roman stem, and was only applied as the readiest means of importing a vigour felt to be defective in the Law as derived from original sources. The Edict of the Prætor promulgated during his term of office justice, in cases where an exceptional departure from rigid rules was clearly a necessary modification of principle, where otherwise hardship and injury would prevail. And though not universally, yet in certain known classes of cases, the judgments thus given, arbitrarily at first, being recommended by obvious policy and adopted by a succession of many magistrates, received a sanction from tacit assent, and ultimately, in the compilation of the *Corpus Juris Civilis*, were accepted as Law.

But otherwise would it have been had the same principles been declared *ab origine*, or had they, in the gradual perfecting of the Law, taken their shape either from direct legislative authority, or from an adequate elasticity in the tribunals to deal with new cases as they arose, being bound, of course, by precedent, as Courts of Equity already are: with this improvement, that instead of the acknowledged law being modified and set aside by the introduction of arbitrary constructions, sometimes a conflict of adverse decision, there would have been harmony throughout both in the end and the means. At no time, however, did the Roman system ever reach that highly technical precision which has arisen to be characteristic of English Equity, its courts and proceedings, and which, as the margin was narrowed by the limitation of precedent over precedent, instead of being, as its pretensions claimed, relaxation of strict law, became, in reality, a more complicated code than the Common Law itself.

It has been maintained that Courts of Equity were requisite to restrain, control, and supply the defects of the Common Law. But why? Because injustice would be done by following the Law! This surely is scarcely a

tribute to the perfection of the Common Law. But if the latter were really defective, or rather, as seems the case, if its formulas were not sufficiently comprehensive to embrace all cases in all their bearings, why should it remain so, and why should legislative assistance be so long withheld, to extend the system and its remedies, without technical twistings around artificial landmarks which rival interests had set up in channels long ago deserted and dry?

Thus the Law of England gives peculiar efficacy to instruments *under seal*, and the proper action on such instruments in a Court of Common Law must, on proof of execution, in general prevail, without reference to any allegation of fraud or other ground of equitable relief, which in such an action would be inadmissible. And in order to get rid of the effect of the judgment, the defendant must resort to a Court of Equity; which will grant an injunction, and inquire into and give relief from the fraud or other circumstances which justify equitable interposition.

And this is said to be necessary from a real difference inherent in the nature of things. To show that it is not so, but a mere technical and artificial distinction, it is only needful to refer to the course pursued in other legal systems. By the Law of Scotland and of other countries, the fraud or other ground of relief will elide the obligation, otherwise formally binding, and may in most cases be taken advantage of, by way either of *action* or exception; that is, it will be a valid answer or defence against the action itself, as well as form the ground of separate recissory proceedings. And in whichever form the question may be raised, it can be entertained and disposed of by one and the same tribunal.

And yet it is an undoubted principle of policy that obligations *ex facie* regular should be capable of ready enforcement, and not be lightly set aside. That this principle, however, is nowise inconsistent with a more simple means of equitable relief may again be shown from the Law of Scotland; which, though it does not adopt the criterion of *the seal*, has a defined mode of attesting written instruments, which gives them even a more summary operation. Because, while proof of execution, on the trial of an action, is necessary to obtain judgment

on an instrument under seal, a writing attested with the statutory requisites is, in Scotland, *probative*; that is, is evidence of its own authenticity. And not only so, but if containing a registration clause (virtually a warrant to confess judgment), it will, on registration, be the foundation of a "Decree conform," which goes as of course, without any proceeding or even appearance in Court. And though in such privileged cases fraud may not be alleged by way of defence, yet on proper grounds, legal or equitable, the proceedings may be stayed, and ultimately set aside in one consolidated action.

Here, in connection with the same principle, it cannot be out of place to advert to that excellent provision of Scottish Law in favour of trade, by which bills of exchange and promissory notes are by statute invested with the same character as registrable instruments, being capable of summary enforcement on registering the protest. This procedure is well worthy of adoption, and it is surprising that up to so recent a date the merchants of England should be subjected, on the denial of a needy debtor, for the sake of delay, to a trial by jury, to receive proof of signature to a bill of exchange.

Again, on the question as to maintaining separate systems of Law and Equity, it may be said in answer to those who assert the natural necessity of such a distinction, why should we in England have the power to recover a debt or damages, obtain delivery of a chattel, or possession of land, in a Court of Common Law, and be denied power to enforce the specific performance of a contract *ad factum prestandum*? What difference is there in the nature of the case between payment or delivery and performance, that each should require the intervention of a separate tribunal or distinct machinery? Clearly none, except the limitations imposed on the constitution and practice of the Courts themselves, by long adherence to precedent and the inadequate provision of the formula required for giving efficacy to the full and free exercise of jurisdiction.

That this is so, is manifest from the practice of Scotland, where the only difference is in the form of proceeding; there

being a distinct remedy for each class of demands administered by the same tribunals.

As showing how potent is the agency of mere formalism in fettering the judicial energies, reference may also be made to the Charters of Justice¹ of the colonies; where, under the name and style of "The Supreme Court," a single tribunal is invested with the jurisdiction and powers of Her Majesty's Superior Courts of Common Law at Westminster, of the High Court of Chancery, and of the Ecclesiastical Courts, there being also usually a commission of Vice-Admiralty. The Judges have legislative authority in regulating practice and procedure by general rules and orders not being inconsistent with the Law of England. It might be supposed that a fairer opportunity for simplifying cumbrous and inapplicable forms could hardly be offered. Not certainly on the principle of *Fiat experimentum in corpore vili*, but because time has not yet reared on the spot a structure of *vested interests* to oppose improvement; nor can there be any conflict of rival authority, where all power is in the same undivided hands, and because there is a mixed population actively engaged, more inclined to get through business readily than to go a roundabout way from excessive deference to mere legal antiquities. In such favourable circumstances no doubt considerable relaxation has already been achieved to disarm the terrors of sharp practice. Yet it is often disconcerting to see how many difficulties arise, and how frequently parties are turned round on mere points of practice. In the absence of consolidated rules of procedure, the powers of the Court are said to be distributive, and to be construed referentially with the constitution of the Judicature in England represented in the particular matter. Thus, where no express provision can be pointed to, the question always recurs, "What is the practice at home?" and litigants and lawyers are alike launched on a sea of doubts all the wider and more perilous by its involving the *moot points* of all the Courts in England. Thus also, the learned Judge takes no judicial notice of any matter depending before himself in another capacity. The

¹ Clark's Colonial Law.

Chancellor cannot act Mr. Justice, nor can the civilian-Admiral help out the Consistory, except according to established precedents at Westminster, Chancery Lane, or Doctors' Commons, as the case may be. Nor, peradventure, would His Honour look into the proceedings on his table, unless put in and proved as coming from the proper custody; although throughout it may be one individual, sitting in the same seat, assisted by the same officials, and with the same parties present and cognisant.

In some of the younger colonies, where the powers of local legislation have been recently enlarged, these restraints are quickly disappearing.

It is now some years since the State of New York, in which the law of England prevails, attracted notice by great innovations in the previous rules of Chancery practice, and more recently it has gone the bold length of abolishing Equity Courts altogether, as distinct from the Courts of Common Law, and establishing one set of tribunals to do the work of both. This has been accomplished in New York by a legislative Act, called "The Code of Procedure," which has since been adopted by several other States of the Union¹; and it is very germane to the subject to show the mode of effecting so important a change.

By this Code "The distinction between actions at Law and suits in Equity, and the forms of all such actions and suits heretofore existing, are abolished; and there shall be in this State hereafter but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action."²

The following is an abridged sketch of the American mode of pleading.³ Civil actions shall be commenced by the service

¹ In a letter to the Editor of the "Law Review," dated July 24th last, Mr. David Dudley Field says, "Ohio is now the one of our states to which we are looking with most interest, from its immense weight in the Union. The Commissioners have been in correspondence with me, and seem resolved to follow closely to New York. So will Indiana, another western state, as I think."—Ed.

² "The Code of Procedure of the State of New York," as amended by the Legislature, by Acts passed 10th July, 1851, and 16th April, 1852, s. 69.

³ N. Y. C. 116. *et seq.*

of a summons, requiring defendant to answer the complaint. In the summons shall be inserted a notice, that on failure to answer, in actions for money, judgment will be taken for a sum specified; in other actions, that application will be made for the relief demanded in the complaint. *A copy of the complaint need not be served with the summons.* A voluntary appearance is equivalent to service. All forms of pleading existing and inconsistent with the Act are abolished. The first pleading on the part of the plaintiff is the complaint, which shall contain “*a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition,*” and “*a demand of the relief,*”—if money, the amount. The only pleading on the part of the defendant is either a demurrer or an answer. The demurrer shall distinctly specify the grounds of objection to the complaint, which can only be, 1. No jurisdiction; 2. No legal capacity to sue; 3. Another action pending; 4. Defect of parties; 5. Several causes of action improperly united; or, 6. That the complaint does not state facts sufficient to constitute a cause of action.¹ The answer must contain, 1. A specific *denial* of each material allegation controverted; 2. A plain and concise *statement* of any *new matter*, constituting a defence or set off, without unnecessary repetition. The answer may set forth many defences. They shall be separately stated, and refer to the causes of action which they are intended to answer, *in any manner by which they may be intelligibly distinguished.*² When the answer contains new matter, the plaintiff may reply, denying specifically each allegation controverted; and he may allege, in a plain and concise manner, without unnecessary repetition, *any new matter* not inconsistent with the complaint, constituting a defence to such new matter in the answer, or may demur for insufficiency, stating the grounds; and may demur to one or more defences, and reply to the residue. If a reply be insufficient, the defendant may demur, stating the grounds. Pleadings “*shall be liberally construed*”, with a view to *substantial justice* between the parties.” If

¹ N. Y. C. 149. *et seq.*² *Ib.* 158. *et seq.*³ *Ib.* 159. *et seq.*

irrelevant or redundant matter be inserted, it may be stricken out on motion; and when allegations are indefinite or uncertain, the Court may require amendment. Every material allegation not specifically controverted shall be taken as true.¹

Travelling in the United States, the writer, at Washington, witnessed the proceedings of Congress and the Supreme Court, and at New York was fortunate enough to be present at the argument of several questions arising out of the Code. It has been fashionable to invest everything transatlantic with an air of the ludicrous, but, faithfully speaking, from individual experience, this certainly was not the characteristic of American publicism which impressed itself on observation. As to the New Practice, like every system not fully established, it is unavoidable that doubtful constructions should occur. This is the case, indeed, with every statute that departs to any considerable extent from the language to which prior decisions have attached a settled meaning. The new judicatures accordingly are not free from a certain degree of embarrassment inseparable from every similar attempt. Yet there is no denying that the countrymen of Story and Kent are proceeding in a very practical and business-like way, and in every probability with continued operation, and the gradual introduction of those modifications which will suggest themselves in the course of practice, great improvements will be exemplified in this mixed administration of Law and Equity by the same tribunals. If an opinion may be hazarded as to what is most defective, it would seem to be, that while our friends on the other side have abolished at once Chancery Practice and Special Pleading out and out, they have established no *formula* or precedent whatever in their place, either imperative or permissive, and have, by the very general terms of the rules for framing the pleadings, guarded but too insufficiently against looseness and verbosity, and left open the door too widely to evasion of the issue. Thus there being no check but the vigilant control of the Judge, there will be frequent motions to strike out redundant and irrelevant

¹ N. Y. C. 168. *et seq.*

matter and to amend, till the adoption of more settled forms. This, however, will not only develop itself with time, but may more rapidly be accomplished by a selection of approved precedents for the guidance of the Profession; and as the Legislature has undertaken the compilation of a *Code*, it would certainly be better that the forms should be completed by the same authority, and not left to be worked out by the martyrdom of whole "generations of suitors paying costs to settle the Law."

The Law Reformers of England have used the pruning knife more warily, and while retrenching superfluous and unmeaning technicalities, have left at least so much of the operative part of the ancient forms as will relieve the practitioner from similar doubts and perplexities; if it does not supply him with a perfect system of classified forms adapted to the full range of business. There is this advantage moreover, that the examples thus furnished are optional, and special pleading may be *dispensed with altogether by the agreement of parties*, which perhaps is the greatest improvement of all.

Two Commissions were successively appointed by the Crown to deal with the pleading practice and procedure,—one of the Courts of Common Law, and the other of the Court of Chancery. Each of these Commissions has made a "First Report," laid before Parliament, and which have been the foundation of the recent statutes.

The Common Law Commission was composed of Sir John Jervis, Lord Chief Justice of the Common Pleas; Sir S. Martin, Baron of the Exchequer; Sir A. E. Cockburn, Mr. Bramwell, Q. C., Mr. Willes, and Mr. Walton, one of the Masters of the Exchequer. The fruit of their labours has been "*The Common Law Procedure Act, 1852.*"¹

The Chancery Commission included Sir John Romilly, Master of the Rolls; Vice-Chancellors Turner and Parker, Sir W. Page Wood, Mr. Bethell, Q. C., Mr. Justice Crompton, with the addition of Sir James Graham and Mr. Henley, as *lay members*. The recommendations of this Commission have been very closely followed out by three separate

¹ 15 & 16 Vict. c. 76. ;

statutes : "The Chancery Practice Amendment Act,"¹ "The Master in Chancery Abolition Act,"² and "the Suitors in Chancery Relief Act."³

Lawyers of the most liberal cast, and among them, or rather as their exponent, the Law Amendment Society, are understood to contend, that the recent changes have not gone far enough, and that nothing can be satisfactory which comes short of "the Fusion of Law and Equity." It is to be observed, however, that the Commissioners have not yet completed their labours, and this very question is one which they have reserved for a future report. Even their recommendations have not been carried out by the Legislature to the full extent, as for instance, in the proposed abolition of the *forms of action*. And there is no doubt that the actual reforms which have been effected will greatly facilitate any future more comprehensive movements. Perhaps the result might be precipitated by a "fusion" of both Commissions, adding one or two Scots lawyers. As it is, we can only shake their separate reports together, to extract truth from the mass.

It would be foreign to our object to recapitulate all the improvements which have been introduced into the Equity and Common Law Courts. Many of them indeed,—for example, power to compel discovery and production of documents, and to take evidence orally, and the substitution in default of appearance of the principle of "holding *pro confesso*" for the barbarous proceeding of "outlawry,"—are such as have long been enjoyed by the practice of other countries, and without which as incident to and inherent in jurisdiction itself, it is difficult to conceive that any Court could adequately fulfil its functions. It is proposed, however, to quote rather largely from the Commissioners' Reports; and to cite the provisions resulting from them, because though the Statute Book is patent to all, and Parliamentary Papers are sufficiently accessible, yet these proceedings may not perhaps be *à la portée* of general readers; at least the points may not be hit on a cursory

¹ 15 & 16 Vict. c. 86.

² 15 & 16 Vict. c. 80.

³ 15 & 16 Vict. c. 87.

perusal, or they may not be consulted with the interest which it will be shown they possess, as elucidating the views of the most advanced legal authorities of the day; explaining the policy and principles of recent legislation, and affording the best data for holding the most prominent questions now afoot with regard to procedure in Scotland.

It is confidently relied on that these selections will indicate not only the excellence of that "conjoined Equity" which has never been lost to the Scottish Courts, but also the superior efficiency of the essential part of the Scots mode of preparing records, which, with the ameliorations about to be submitted, may well stand comparison with the systems, improved as they have been, of England and America.

At the same time we shall not be left in doubt as to what parts of Scots procedure should be amended. The full weight and influence of these authorities will be found to go in favour of the extension of summary jurisdiction,—*vivâ voce* pleading,—oral evidence,—the examination of parties,—the abridgment of written proceedings,—agreement of cases and issues by consent of parties,—simplicity of form,—amplitude of power of amendment, and accessible means of review.

The several topics will be taken up by first exhibiting the views of both Commissions on the general subject of pleading, and then adopting the order in which the questions naturally arise in the course of the proceedings of an action.

On PLEADING the Common Law Commissioners say,—

"We have not found the uniformity of opinion which we could have desired among those to whom we submitted the suggestions we thought it right to circulate for consideration."

"The pleadings in an action at Law are written statements made by the plaintiff and defendant of their respective grounds of action and defence. The object is to ascertain *what are the matters really in controversy* between the parties, so as to avoid all discussion and inquiry on those which are not so; thus simplifying the matter for the decision of the Judge or jury, and saving the parties unnecessary expense and trouble. To accomplish this object, the plaintiff in the first place is required to state the facts

which constitute his cause of action. The defendant is required to answer, and in so doing is compelled, at his option, to take one of the following courses : either he denies the statement of the plaintiff, or, confessing it, avoids its effect by asserting some fresh fact; or, admitting the facts alleged, he denies the legal effect of them as contended for. In the second case put, the plaintiff will be under the like necessity, and will have to reply to the fresh matter of fact alleged by the defendant, subject to the same rule. In like manner, if necessary, the defendant rejoins; and so the parties proceed till it is ascertained that there is some Fact asserted by the one side and denied by the other; or that there is some proposition of Law affirmed on the one hand, and denied on the other. The questions so raised, are called issues in Fact or in Law, as the case may be."

After citing great authorities of former days, in favour of what they designate "the bright side of the subject," the Commissioners add:—

"We fully concur in these observations as to the merit of what may be termed the *essential principles* of the system; but it is equally certain, that there now exists in the public and a large portion of the Profession, a strong dissatisfaction with pleading *as at present* practised. We think such dissatisfaction well founded, and that the defects by which the system is vitiated must be cut away with an unsparing hand."

After disposing of the question whether any, and what, particularity of *notice* should be given by written pleadings, the Commissioners proceed to make bold recommendations, by which the greater part of the so called "hearing on special pleading points" has been wiped out of the books,¹

The result is thus stated:—

"That every declaration and subsequent pleading which shall clearly and distinctly state all such facts as are *necessary to sustain the action, defence, or reply* as the case may be, shall be sufficient; and that it shall not be necessary that the facts should be stated in *any technical or formal language or manner.*"

Nor do they stop here: having shown that all such technical, or formal statements, as would be appropriate to

¹ Com. Law Report, p. 22.

any of the present *forms of action*, are by the effect of these recommendations rendered nugatory, they proceed to propose the abolition of the *forms of action* themselves. They admit indeed the advantage of classification; but show that this is only imperfectly attained by the present system, inasmuch as "it being laid down that where there is a cause of action, and *no other form* is applicable, *an action on the case* will lie, it seems difficult to see how in any case the question whether some action is maintainable can be determined merely by referring to existing forms."¹

The total abolition of the forms of action, thus recommended, has indeed not yet been given effect to by the Legislature, by express enactment, but it practically results from the other amendments, and so far as *forms* are prescribed, it is only with the object thus explained:—

"We object to *forms* (and more particularly forms encumbered with technicalities being obligatory); but we approve of the adoption of precedents, concisely stating the matters of fact relied on, when they meet the particular case.

"It has been frequently stated that causes of action and defence must necessarily *be classified*, as many, although varying in the particular circumstances, are substantially *similar in character*. There seems to us no reason why this should not be so under the system we propose; the only difference will be, that *the classification will be the natural result of the similarity of the facts, instead of being artificial and technical.*"²

Nothing could be more satisfactory than the views thus promulgated, if fully carried out. It would have been well if, while any essential advantages of the present mode of pleading had been retained, and all mere artificiality rejected, the Commissioners had gone on a little farther in a philosophical classification of actions, and perfecting the precedents of pleadings. Where they have come short is apparently where they have leant too deferentially to prevalent professional maxims. As an instance we quote the following defence or "avoidance" of one of the most objectionable

¹ Com. Law Report, p. 33.

² *Ib.* p. 34.

points in special pleading,—its vagueness, and inadequacy to give notice of the real controversy.

“Instances¹ of uncertainty and vagueness are to be found, first, in the use of what are called the *indebitatus* counts, by which a party suing another for debt, alleges in his declaration that the defendant is indebted to him for goods sold and delivered, or for work and labour, or materials furnished, or money lent or paid to his use, or on an account stated, *without farther specifying* the subject-matter of the transaction, or the *circumstances under which the debt arose*. No doubt *this mode of declaring is inconsistent with the theory of pleading, and would be insufficient to attain the desired objects*, were it not that practically the same result is effected by the *plaintiff* being compelled in such cases to deliver *with his declaration the particulars of his demand*, and to add still more detailed and precise particulars *if a Judge* shall think right to order them. By these means a party sued obtains all the necessary information as to the plaintiff's demand, more especially as, in actions for debts defendants have generally had *previous demands* made upon them, and *bills* delivered, and are pretty well aware of what the claim is. Practically, this mode of pleading, applied to the more simple class of cases, works satisfactorily, *and we are not disposed to meddle with it*.”

“A particular objection under this head may be raised to the count for *money had and received*, which form of statement may be adopted in very many cases *where it is untrue* in ordinary parlance that *any money* has even been received to the *plaintiff's* use. Thus a party having possession of the goods of another, (for instance, a carrier) demands a sum of money to which he is not entitled, as the condition for delivering them to their owner: the owner, in order to obtain his goods, pays the money under protest; he is allowed to recover it back in this form of proceeding, upon the *legal intendment* that the money was received by the defendant to his (the plaintiff's) use. So where there are several claimants at an office, and the plaintiff is really entitled to it, but the defendant has received some fees belonging to it, asserting his right to them and to the office, the plaintiff may recover the amount of such fees as money had and received to his use.

“Here again it is obvious that *the theory* of special pleading, as to *giving information to the parties*, is departed from; and *we*

¹ Com. Law. Rep. p. 16.

have had some hesitation, whether we should not recommend the disuse of this artificial mode of stating legal implications from the facts, in lieu of the facts themselves. But here, as in the former case, the right to *particulars of the demand* materially diminishes the objection; and *there exists so much difference of opinion* on this subject, and so strong an *indisposition on the part of many members of the profession* whose opinions are entitled to great weight, to relinquish the present form of pleading in cases of this nature, that *we have not thought it right* to propose an alteration."

When it is considered that "cases of this nature" comprehend a most numerous class of actions, especially of *mercantile* claims, and the learned Commissioners concede that the real object and purpose of pleading is insufficiently served, except by particulars, or a common account delivered, it is pretty much like throwing up the case for Special Pleading, and leaving it to its own supporters.

The same testimony in favour of Summary Procedure is given by the Chancery Commissioners to whose Report we shall now advert.

In giving a sketch of the changes introduced to diminish delay and expense of Equity Proceedings, the Commissioners say,—

"The almost uniform course of legislation in respect of the Court of Chancery, has been to give the Court jurisdiction to deal with matters *upon petition*, where, without the authority of Parliament, it could not have so done."¹

And the following measures are noticed:—

"1812. Sir Samuel Romilly's Act, giving summary procedure in *charity cases*. Sir Edward Sugden, now Lord Chancellor St. Leonard's Acts, consolidating and amending prior Statutes, enabling the Court to deal summarily with Trust Estates, and Trustees, recently extended by Mr. Headlam. Lord Cottenham's Trustees Relief Act. Vice-Chancellor Turner's improving Chancery Proceedings as to executors and administrators, and enabling parties *to state facts by way of special case, without any further pleading* for the decision of the Courts, and admitting affidavits for many

¹ Chancery Commissioners' Report, p. 11.

purposes. The winding up Acts, to ascertain and enforce liabilities of Shareholders in Joint Stock Companies : Bankruptcy and Lunacy Acts : Lord Cottenham's orders of April 1850 ; the last and greatest change in Chancery Procedure, dealing summarily in specified cases, and *in every case in which the Court thinks fit, by filing a claim and affidavits.* In Ireland, a more extensive and more systematic alteration by the Act of Sir John Romilly, Master of the Rolls, enabling plaintiff to proceed *in every case by petition.*"

After this sketch the Commissioners say,—

"The substitution of summary procedure for the ancient forms of the Court, wherever it has been adopted, has been *acceptable to the suitors*, who have availed themselves of every change in that direction.

"We are of opinion that the proper progress of Chancery Reform is in the same direction, that is to say, to substitute *in every case which admits of it, the shortest and most summary process, with the least amount of preliminary written pleadings*, and to bring the parties by themselves or their counsel to state their cases with as little delay as possible to the tribunal which has to decide. It is a matter of frequent occurrence in Court to see cases *encumbered with statements and counter-statements, evidence and counter-evidence*, with which the parties have been for years harassing each other, although there has been throughout *no substantial dispute as to the facts*, and the real question lies within a very narrow compass, and would have been probably evolved in the first instance, if the Court had had the power *summarily* to ascertain and deal with the facts."

Such being a general announcement of the policy which has dictated the recent measures, we now turn to actual Civil Procedure in Scotland ; commencing with certain steps common to both the Supreme and Local Courts, and then to such as are peculiar to the latter.

Considerable improvements have recently been introduced by a Statute passed in 1850 (known as Lord Rutherford's Act), "to facilitate Procedure in the Court of Session."¹

All ordinary actions commence by summons, which writ was formerly required to contain *in gremio* a narrative of the whole facts and circumstances averred in support of the

¹ 13 & 14 Vict. c. 36.

cause of action. But by the Statute just referred to, the statement of the grounds of action are no longer to be embodied in the summons, but the allegations in fact are to be set forth in an articulate condescendence, together with a note of Pleas in law, which "shall be annexed to such summons, and shall be held to constitute part thereof; and the defences to such summons shall be in the form of articulate answers to such condescendence; and where necessary, have appended thereto a statement of the allegations in fact, on which the defender founds in defence, and a note of the defender's pleas in law."

In a Schedule are given examples of forms of summons thus shortened in the reciting part, but still embodying the "conclusions" deduced from the facts, being the relief sought in the action, and where money is claimed, setting forth the amount, and the documents of debt, if any. Then follows "the Will," or operative part, which is merely a warrant to cite the defender to appear to the action within a certain number of days, called "the Induciæ." By Act of Sederunt of the Lords¹ of Council and Session (General Rules and Orders), the same provision is extended to Sheriff Courts, with this modification, that in what these latter Courts designate as summary applications, where greater dispatch is contemplated, the summons is superseded by a "Petition," setting forth the relief in the prayer; but so far as regards the foundation of the record, the same course is observed, by appending the statement of facts and notes of Pleas in law, and "the answers to the petition shall be framed in the same manner as defences in an ordinary action."

On these Pleadings the record *may* be closed, and the case may go to trial, proof, or adjudication.

It happens rarely, however, that parties are satisfied without "revising" their pleadings; and for this, as well as for reference, there is certainly greater facility and convenience under the present form, than the old one, of mixing up the real record, with an instrument of verbose and antiquated structure.

¹ July 18. 1851.

Still, as such a revise is not a necessary step, as it involves additional expense and delay, and as these original pleadings may constitute the *record*, great care and deliberation are necessary in their preparation, and also in the framing of the conclusions of the summons or prayer of the petition.

This leads not only to an unavoidable and certain expense in *all cases*, whether the claim be undeniable and just or otherwise; but it also frequently involves serious consequences, when from necessary haste to save a debt, or from oversight or accident, a trivial failure may occur in some technical nicety, or the curious observances of form are in any material respect departed from. The chances of unmerited success, or even the gaining of delay, on some of the thousand and one grounds of dilatory objection, must hold out a premium to the dishonest debtor to make at the outset a show of resistance, and to hold back a just claim as long as chicane will enable him; and even in the face of peril of greatly enhanced ultimate loss, which, however, the chances may throw on the adversary. Nay, even when a defender is willing to afford every expedition and facility, his *consent is unavailing to dispense with the necessary solemnities of law*.

The evils of such a system have been exposed and remonstrated against, time out of mind, and it does not appear that in Scotland all has yet been done, which a very moderate step further in advance would at once accomplish.

To the condescendence itself there appears no objection, unless it be the name. In essentials, this pleading, when correctly framed as a separate paper, according to the practice of Scotland, may be advocated as the most convenient mode of all, of preparing records, and of eliciting clear and exact issues by articulate averment, admission, and denial.

We object, however, to its being connected in any shape with the summons, with which its objects are in no wise akin. For the important purpose which it subserves, it ought to be prepared at a subsequent stage of the suit, with the utmost care and deliberation to a degree altogether inconsistent with that promptitude and despatch so often needful in the first steps of proceedings. The summons, therefore, we contend,

ought simply to be the means of bringing *the parties into Court*. It may or may not also be a warrant for arrestment and inhibition, though this might be accomplished by separate precepts. But it should be entirely disburdened of detail in allegations or "conclusions," — all of which will be much better disposed of in a separate record.

It is just and proper, no doubt, that the defender should have notice of the nature and amount of the claim which he is called to answer, to such an extent as that it may be clearly identified, and that he may be enabled to decide whether to oppose the claim or allow it to pass tacitly uncontested. More than this it is altogether superfluous for the summons to disclose; and this purpose can most conveniently be effected (in all but special proceedings, for which simple forms can be provided), by appending to the writ, not a condescendence, but *an account* of the particulars of the claim, in form somewhat similar to that which has just been introduced into practice in England, under the name of "Special Indorsement."¹

It appears that the question of abridging the summons to a simple form of writ was mooted so long ago as before the Scots Law Commission of 1833²; and although considerable difference of opinion is said to have existed, a resolution unfavourable to so material a change on the form of the record prevailed.

In their Report the views of the majority of the Commissioners are stated with great force; but the question is treated as if the sole object of such a clause were, to facilitate the use of diligence by arrestment and inhibition (a sort of attachment and injunction to secure the real and personal estate of the debtor to abide the suit), without affording him adequate information of the claim; and on this assumption, the Commissioners, adverting to the abuses which even under the then existing system resulted from the reckless and oppressive resort to such proceedings by pursuers, from malicious or insufficient motives, opposed any new faculty being given

¹ 15 & 16 Vict. c. 76., Schedule A. No. 4.

² Scots Law Commission Report.

by which these evils might be aggravated. And conceiving the summons to be, in form and structure, well adapted for all requisite purposes, they would give no countenance to the hasty or inconsiderate commencement of suits by shorter means.

On this it may be observed that the unwarrantable use of diligence was conceded to be an existing evil; and that though there were already remedial means in the power of the Court to restrict or recall, and in the right of action by the defender for damages for injury to his property or credit, yet these means were allowed to be inadequate; and this even when the summons was "fully libelled," and no objection of looseness could be raised.

In such circumstances it would seem that this state of things required something more to be done than merely to be left alone; and possibly a remedy for the abuse might have been found, consistently with an improvement in the form of the record.

If the practice already afforded too great a facility for oppressive diligence, it might have been necessary to do more or something else than maintaining the narrative and conclusions of the summons. The summary powers of the Court, if not already sufficient, might have been enlarged, for the suppression of malpractice, and the warrant for execution against the debtor's property might have been fiatd only on special application, accompanied by security to abide the Orders of Court. The exercise of the privilege may be regulated without obstacles being placed at the threshold of all proceedings. With such a check on improper process, and provided the defendant has notice of the general nature and amount of the demand, it does not appear necessary that with a view to diligence, all that particularity of statement should be required which, in the event of contest, it may afterwards be expedient to put on the record; and to require such, under all the consequences which result from the highly technical exposition that is given in the decisions on the form of the summons, is simply to interpose the chances of defeat on any of these niceties between the claimant and

the following out of his rights. The same argument, indeed, may be used, and has long been so, to support any formulæ whatever, and how artificial soever; it is no other than the adage, now happily exploded, that justice ought not to be too accessible, but be approached only at great care and cost.

It is admitted by the Report that of the great number of summonses, very few, after all, are made the foundation of diligence; and, assuming that such were the only object of dispatch and simplicity, it is consistently concluded that the proposed change does not present advantages commensurate with the objections.

There is, however, another element to be considered, the *expense in undefended suits*. Let it be viewed as it affects the interest of either the plaintiff or defendant. Suppose the latter to be every way disposed, from a recognition of the justness of the demand, to a judgment being obtained against him, and to offer no opposition to the claim. Is there to be no means of accomplishing this, except at the same preliminary expense as if there was to be an important legal controversy?

The question whether the "writ" and "declaration" should be combined, is substantially the same as whether the summons should comprise a condescendence, with this difference, that the condescendence is much more elaborate in its allegations than the declaration in English practice. This question has also been agitated in England, and it will be seen how important it is regarded as well as the decision that has been arrived at.

To determine their opinions on this point the Commissioners obtained returns from the Courts of Queen's Bench, Common Pleas, and Exchequer, during the years 1846—1849 inclusive.¹

These returns show that on the average, in these years, in the three Courts, the number of appearances entered was to the number of writs issued in the proportion of little more than *one half*.

"It appears, therefore, that in very nearly one half of those

¹ Com. Law Report, p. 35.

suits the writ itself was effective in the period of eight days (being the time limited for appearance) to cause a settlement. The probability is, that those writs to which no appearance was entered were issued to recover debts clearly due, and which the debtor paid or arranged at once, to avoid further expense."

The returns of Rules to Plead, that is, where plaintiffs force the defendants on, show a falling off from the number of appearances of more than *one fourth*.

"It appears, therefore, that one half of the cases in which writs are issued begin and end with the first step, the summons; and that before the time for pleading has expired, which varies from twelve to sixteen days, more than one-fourth of the actions in which appearances had been entered are settled. The probability is, that all of these are also for clear and undisputed demands."

By the returns of Judgments, it appears that about three per cent. on the suits commenced, five and one half per cent. on the suits not settled within eight days from the commencement, and about eight per cent. only on those in which there has been a declaration, are defended.

"It is obvious, upon the above facts, that it is of the highest importance that the process and practice of proceedings in causes which, popularly speaking, do not come into court at all, should be of the most simple character and of the least possible expense to the parties."

"We start, therefore, with the fact as ascertained from the returns referred to, that in the vast majority of actions commenced there is no disputed question between the parties either of law or fact. The defendant perfectly well knows what the claim is, and requires no information on the subject; and the writ merely operates to compel immediate payment from a necessitous or backward debtor of a known and admitted debt. Now as the object of the declaration is to give information to the defendant, and as to do so with effect some particularity and precision must be required, it seems to us that the combination of the writ and declaration together would lead to greater expense than is at present incurred.

"It would render a declaration necessary in every case; whilst,

¹ Common Law Report, p. 36.

as we have seen in one half of the actions actually commenced, no declaration is prepared or required. We are certain that it would lead to the employment of counsel in actions in which they are not now consulted at all.

"This would cause a very great increase of expense; and considering also how important it is that creditors *should not be delayed* when his debtor is either about to leave the country or to assign over his property, or is attempting to evade service, we think *that the first or initiatory step in a suit should be attainable at a moment's preparation, and be in a form so simple that a mistake or error can hardly occur.* We therefore recommend that the two proceedings shall continue distinct; and we think that a provision which we are about to propose will practically effect the benefit contemplated by those who advocate the combination, without the accompanying evil.

"The practice which we suggest is, that whenever the cause is defended (which is evidenced by the appearance) there should be a declaration or, in other words, a legal statement of the claim; but when the defendant does not appear, and has neither the power nor intention to defend the action (which is the case, as we have shown, in a great majority of instances), we think that *in all actions for liquidated demands, if there be indorsed on the back of the writ a substantial particular of the plaintiff's claim, the declaration may be safely dispensed with altogether.*"

It was also objected by the Scots Law Commissioners that reducing the summons to a mere writ, would affect the power of taking decrees in absence. How little this is so, may be gathered from the following commentary on the recent introduction of final judgments in default of appearance.

"The requirement that the copy of the writ should be filed, and the special indorsement being thereon, *insures a record of the subject matter of the action, more effectually than even a declaration, as the very items of the claims will be filed in the office of the Court.*"¹

We are thus enabled to place opposite to the Report of the Law Commissioners of Scotland of 1833, that of the Commissioners of England of 1851, and also the new practice

¹ Morris and Finlaison on the "Common Law Procedure Act," 1852, p. 246.

of America¹, on a point on which the general public of both countries are extensively interested, and on which they have already spoken out in a manner not to be misunderstood, if any token of public opinion is to be gathered from the numerous brochures which have appeared, and the resolutions of meetings adopted, having for object the simplification of the forms of legal procedure, and the extension of summary jurisdiction.

Indeed, since the stereotyping of ancient forms, lawyers have had their *viginti annorum lucubrationes*, and would probably in these wondrous days of steam and rail also have their cogitations quickened, and come to freer determinations. The monstrosities of "storning and caption" have been lopped off, and it is to be hoped that "libelled summonses" will soon follow.

In one particular already, as has been seen, the formal exactions so enforced have been relaxed. Instead of the summons now *containing* the case, it is *appended* in the form of a condescendence: and the step of improvement now contended for is simply this,—not that the summons should give *no notice whatever of the demand* (for it is proposed to indorse or annex the particulars), but that the detailed circumstantial setting forth of the whole facts in support of the case necessary to the discussion and decision of a contested suit should not be required of the pursuer, till it is seen whether his claim is or is not to be opposed at all.

The enactments of the Common Law Procedure Act², which gave effect to the part of the Commissioners recommendations are as follow:—

"Special indorsement of the particulars of debts or liquidated demands may be made on the writ, in the form of Schedule A. No. 4. *or to the like effect.*"

In case of non-appearance where writ is specially indorsed, final judgment may be signed *for any sum not exceeding the sum indorsed*, with interest and costs, in the form of Schedule A. No. 5., and execution may issue at the expiration of

¹ N. Y. C. 130.

² 15 & 16 Vict. c. 76. sec. 25., and Schedule A. 4.

eight days from the last day for appearance; but defendant may be let in on application supported by *affidavits, accounting for the non-appearance and disclosing a defence on the merits.*¹

We proceed now to those provisions which are perhaps the most important in the Act, as a counterbalance to the maintenance of what is left of Special Pleading, and by the effects of which the system peculiar to the Common Law of England will gradually in practice be superseded altogether; viz. the facilities for the determination of questions raised "by consent of the parties, without pleading."²

Where the parties are agreed as to the questions of fact to be decided between them, they may, after writ issued, and before judgment, by consent and order of a Judge, proceed to the trial of any question of fact, *without formal pleadings*; and such questions may be stated in an issue in the form contained in Schedule A. No. 6. Agreement may be entered into for the payment of money and costs according to the result of the issue.³

Judgment to be entered according to the agreement, and execution issued forthwith, unless stayed.⁴ The parties may, after writ issued, and before judgment, by consent and order of a Judge, *state any questions of Law* in a special case, for the opinion of the Court, without any pleadings, and agree as to payment of money and costs according to judgment. Unless otherwise agreed, costs to follow the event.⁵

This last provision is accordant with the American practice⁶, by which parties to a question in difference, *which might be the subject of a civil action*, may, *without action*, agree upon a case containing the facts upon which the controversy depends, and present a *submission* of the same to *any Court which would have jurisdiction*, if an action had been brought, it appearing by affidavit that the proceeding is in good faith, to determine the rights of the parties; and the Court is to render judgment as if an action were depending.

¹ 15 & 16 Vict. c. 76. sec. 27., Schedule A. 5.

² *Ib.* s. 42., and Schedule A. 6.

³ *Ib.* sec. 43.

⁴ *Ib.* sec. 46, 47, and 48.

⁵ *Ib.* sec. 44 & 45.

⁶ N. Y. C. 372.

On a consideration of these provisions it cannot be doubted that if similar privileges were conferred on suitors in the Scottish Courts, the complaints against the present system of preparing records would be greatly diminished if not entirely met; and it perhaps would be accomplished in a very simple way by allowing the defender, *on entering* appearance, to minute his consent to an agreed course, subject to the directions of the Court or Judge, on motion after notice; no formal record being made up, but such proceedings had as the Court or Judge, after hearing, and with consent of parties, may see fit to order.

When, however, an important controversy is really to arise in a suit, and a record of the allegations and pleas in detail cannot be dispensed with, it comes to be inquired what is the best mode of making up such record.

The English mode at Common Law is more regulated by Sect. 91.¹, which, after reciting that “it is desirable that *examples should be given of the statements of causes of action and of forms of pleading*,” enacts that “the forms contained in the Schedule B. shall be *sufficient*, and those and the *like forms* may be used, with such modifications as may be necessary to meet the facts of the case; but *nothing herein contained shall render it erroneous or irregular to depart from the letter of such forms*, so long as the substance is expressed without prolixity.”

Adverting to those claims it will be found that there are, for example, such “statements of causes of action” as the following:—“1. Money payable by the defendant to the plaintiff for goods bargained and sold by the plaintiff to the defendant; 2. Work done and materials provided by plaintiff for defendant at his request; 3. Money lent by plaintiff to defendant; 4. Money paid by plaintiff for defendant at his request; 5. Money received by defendant for the use of the plaintiff; . . . 13. *Freight* for the conveyance by plaintiff for defendant, at his request, of *goods in ships*; 14. The demurrage of a ship of plaintiff kept on demurrage by defendant,” &c.

¹ 15 & 16 Vict. c. 76. s. 91., and Schedule B.

These "statements" may be met by the defendant by a "plea" "That he never was indebted as alleged."

Now keeping in mind the observations of the Common Law Commissioners, already quoted, as to the object of Special Pleading, and as to the *Indebitatus* counts, it may be asked, what information such pleadings afford, either to the parties or the Judge, of the *real* points in controversy, or how do they enable either party to provide so much, and only so much, evidence as may be requisite in support of the action or defence, or to guard against surprise at the trial; and of what utility is it that the issue is what is called "self-developed" by Special Pleading, if it is not the *true* issue?

As a contrast to this mode of allegation, we find the Chancery Commissioners expressing their views of what the record should be in the following language: —

"The Bill is a petition addressed to the Court, containing when properly drawn *a concise narrative of the material facts and circumstances on which the plaintiff relies*, and we are of opinion that such concise narrative, *under whatever name*, should be retained as the ordinary basis of the proceedings."¹

Accordingly, the following are the provisions of the Chancery Practice Amendment Act²: — Every bill *of complaint* shall contain, as concisely as may be, a narrative of the material facts, matters, and circumstances on which the plaintiff relies; such narrative being *divided into paragraphs, numbered consecutively*, and each paragraph containing as nearly as may be, a separate and distinct statement or allegation, and shall pray specifically for the relief which the plaintiff may conceive himself entitled to, and also for general relief; but such bill of complaint shall not contain any interrogatories for the examination of the defendant.³ If answers are required, interrogatories are to be separately filed. The defendant may answer of his own accord, though not required. "The answer may contain, not only the answer of defendant to the interrogatories filed, but such statements

¹ Chancery Report, p. 24.

² 15 & 16 Vict. c. 86. s. 10.

³ *Ib.* sec. 12.

material to the case as defendant may think it necessary or advisable to set forth therein ; and such answer shall also be *divided into paragraphs, numbered consecutively*, each paragraph containing, as nearly as may be, a separate and distinct statement or allegation."¹ In certain cases defendant may file interrogatories for examination of plaintiff, or may exhibit a cross bill instead.²

By General Rules and Orders made pursuant to the same statute, by Lord Chancellor St. Leonards, with the assistance of the Equity Judges, forms of bills of complaint, interrogatories, and answers will be found in schedules B. C. and D.³

On examining these regulations and forms, there is a striking approach to the Scots mode of averment, especially in the new requirement of concise and distinct statements, in numbered paragraphs, or articles. It comes short, however, of the Scots system in not exacting an *admission or denial of each substantive proposition under corresponding numbers*, which is the characteristic excellence, as answering without evasion, the eliciting of exact issues. It moreover mixes up the record unnecessarily with what more properly belongs to the evidence in support of it ; as the examination of the parties ought to be allowed at any stage, and more conveniently, as we conceive, without written interrogatories. And it appears in one respect inferior to the Common Law system, in that, while by the latter the record is not required at all till after it is seen, by appearance or default, whether it may be necessary, and while the Chancery Commissioners themselves, as already quoted, express their solicitude to curtail preliminary expenses, they have required in all cases a record of the plaintiff's allegations, even before the defendant has been served with process to appear.

For these reasons, provided the condescendence is not required as an integral part of the summons, and provided the record be not prepared till after the defendant has signified

¹ 15 & 16 Vict. c. 86. sec. 12, 13, & 14.

² *Ib.* sec. 19.

³ *Ib.* sec. 63., and General Rules and Orders, Aug. 7. 1852, Schedules B. C. and D.

his intention to contest the suit, and after parties have had an opportunity to agree on a course, we unhesitatingly give the preference to the Scots mode of averment, admission, and denial, and would make no further change on the existing frame of the condescendence, except in adding, on the plaintiff's part, the remedy or claim of relief as now set forth in the conclusions of the summons.

In the highest Court of Judicature in the realm, in the most complicated and difficult controversies, the whole facts and law in dispute are to be found in a *single paper* on each side, — “the case.” It has the advantage of flexibility, being adapted to assimilate with the procedure of any Court, however constituted, and in whatsoever form the technical commencement may be; — whether by summons, libel, bill, petition, complaint, or claim; and its perfection is of most easy accomplishment in Scotland, where, either under the old name of “Condescendence,” or any other more accordant with *comity*, the substantial advantages of the present system of records may be maintained with little variation of form.

As to defects of form and amendments, by the Common Law Procedure Act either party may object by demurrer to the pleading of the opposite party, on the ground that such pleading does not set forth sufficient ground of action, defence, or reply, as the case may be; and the Court shall give judgment according as the *very rights of the cause and matter in Law* shall appear unto them, *without regarding any imperfection, omission, defect in or lack of form.*¹

And (after reciting the power of amendment now insufficient to prevent failure of justice by reason of mistakes and objections of form), the Courts and any Judge may at all times amend all defects and errors, with or without costs, and upon such terms as may seem fit; and all such amendments as may be necessary for the purpose of determining the *real question in controversy* shall be so made.²

We now proceed to the new provisions as to evidence.³

¹ 15 & 16 Vict. c. 36, s. 50.

² *Ib.* sec. 222.

³ 14 & 15 Vict. c. 99, s. 2.

By the Law of Evidence Amendment Act of 1851, on the trial of any question, or on any inquiry in any Court or before any person having, by Law or by consent of parties, authority to hear, receive, and examine evidence, *the parties* thereto, and the persons in whose behalf any such proceeding may be brought or defended, shall, except as therein excepted, be competent and compellable to give evidence, either *vivâ voce* or by deposition, according to the practice of the Court, on behalf of either or any of the parties to the proceeding.

The exceptions are: — Persons charged with crime not to give evidence for or against themselves; no person to criminate himself; and Act not to apply to any proceeding in consequence of adultery or for breach of promise of marriage.¹

There are also very useful provisions, facilitating proof of foreign and colonial Acts of State, Judgments, and other documents.²

This statute does not apply to Scotland, but from announcements already made in Parliament, there is every reason to anticipate it will at no distant day be adopted in the administration of justice there.

It may be observed, however, that this admission of the evidence of parties is more extensive than is allowed by American Law, which is thus limited: — A party may be examined as a witness *at the instance of any adverse party* at or *before* the trial. The examination may be rebutted by adverse testimony. A party so examined may be examined *on his own behalf*, in respect to any matter pertinent to the issue. But if he testify to any *new matter not responsive or necessary to explain or qualify his answers*, or discharge when his answers would charge himself, his adversary *may offer himself as a witness on his own behalf* in respect to such new matter.³

By the Chancery Practice Amendment Act⁴, affidavits by particular witnesses, or affidavits as to particular facts or circumstances, may, by consent or leave obtained upon notice, be used on the hearing of any cause⁵, such affidavits to be

¹ 14 & 15 Vict. c. 99. sec. 3 and 4.

² *Ib.* 5. *et seq.*

³ N. Y. C. 390. *et seq.*

⁴ 15 & 16 Vict. c. 86. s. 36.

⁵ *Ib.* sec. 37.

paragraphed and numbered.¹ Any witness who has made an affidavit shall be subject to *oral cross-examination*, and afterwards to *re-examination*.² And the Court may require the *production and oral examination before itself* of any witness or party.

Affidavits have hitherto been little known in judicial proceedings in Scotland, and are chiefly used in matters of bankruptcy; respecting which, however, complaints have been made of unfounded claims verified by affidavits, which could not be brought to the test for want of provisions similar to those now cited. Affidavits are very useful as *prima facie* evidence, and in many cases supersede or abridge more expensive and dilatory proof.³ On the authority cited, we should rather be disposed to extend their use than to exclude them; but in all cases of ultraneous testimony there should be held over the power of cross-examination, which would be a great check on false swearing.

The foregoing suggestions, it will be seen, are applicable to the Supreme and Local Courts equally. It is now time to take up some considerations which have reference exclusively to the latter. Proceedings in the Sheriff Courts are of four classes: — 1st, ordinary cases; 2nd, summary applications by petition; 3rd, maritime causes; and 4th, summary small debt claims. These will be considered in the order just stated.

As regards the Sheriff's ordinary jurisdiction, which, in personal claims, is without limit as to amount, it seems necessary to introduce some modifications of practice. The present system is described as one of lengthened *written* argumentative pleading, frequent reclaiming petitions, and appeals at every stage of the cause, interlocutory as well as final, advised in the closet, at a distance from, and without communication with, the parties. Accordingly, complaints are very general, both on the part of the Public and of the Profession, and the present juncture has been seized as favourable for a total remodelling of procedure. It is hoped that the exposition given in the preceding pages of what has been done in

¹ 15 & 16 Vict. c. 86. sec. 38.

² *Ib.* sec. 39.

³ Chancery Report.

removal of similar defects elsewhere, will not be without its influence; and that the adoption of similar ameliorations, both in the Supreme and Local Courts, would establish universal confidence and satisfaction among suitors. What would then be wanted in this department of jurisdiction would simply be, *assimilation with the Court of Session.*

It is remarkable that from the Scots Law Commission of 1808 downwards, and even from a more remote date, the principle of assimilating the procedure in the Sheriff's Ordinary Courts with that of the Supreme Court has been uniformly admitted. It appears even in the recitals of the Acts of Sederunt, for regulating the Sheriff Courts, one of which has this preamble¹: — “Whereas the existing rules in regard to the preparation of records in Sheriff Courts, established by Act of Sederunt, 11th July, 1839, have been found in practice inadequate to secure that *simplicity and precision*, both of statement and pleading, which is so *essential to the* proper administration of justice; and it may tend to *great uniformity of practice were a closer assimilation to be made* in this respect of the system of procedure to be followed in the Sheriff Courts to that which now prevails in the Supreme Court.”

In the face, however, of the principle thus sanctioned, it is said to be true at this day that, exclusive of Small Debt summary claims, there is no such thing known in the ordinary practice of Sheriff Civil Courts as a *vivâ voce* argument on the merits, the oral examination of a witness, or the pronouncing of a decree in open court; — the whole of these proceedings being committed to writing. It is supposed, indeed, that this does not entirely result from the requirements of the Acts of Sederunt, although the practice is such. But there appears to be either the want of explicit rules, or an evasion of them. This anomaly has been ascribed to the mistrust with which the local tribunals were long regarded in high quarters, and their supposed inadequacy, without the immediate assistance and revision of the Supreme Judicature, to cope with *vivâ voce* forensic practice, especially in the most important and difficult part of it — civil jury trial. If so,

¹ A. S. 13th Feb. 1845.

the time has surely come when more favourable auspices prevail, and there is a reasonable prospect of success in making a stand for the assimilation of the ordinary procedure before the Sheriff Courts to the most approved practice in the Supreme Court out and out.

This involves the extension (*mutatis mutandis*) to the Sheriff Courts of some provisions of Lord Rutherford's Act, which at present appear to apply only to the Court of Session¹: such as the prohibition of *written arguments*; power to the Judge of consent to try issues without a jury, subject to review on his own notes of the evidence; the findings in fact to be final, unless reclaimed against; power, without adjusting an issue, to try special facts without a jury; trial by one, three, five, or seven arbiters, chosen by the parties.

It also involves the introduction of trial by jury in ordinary civil causes before the Sheriffs.

We are aware that the very name will alarm many Scots practitioners and suitors, among whom there is still understood to exist a strong prejudice against a jury in civil actions. In alleged deference to this feeling, and because of "the immaturity of practice" in Scotland, the Law Commission of 1833 reported against the adoption of jury trial in the Sheriff Courts. It is to be hoped, indeed, that by the improvements now sought to be introduced into the administration of civil justice, especially the disposal of questions by consent, personal examination of the parties, the admission of *affidavits*, subject to cross-examination in specified classes, and the more simple and exact mode of preparing the record; the field of controversy, so far as regards *disputed fact*, will be at once greatly abridged, and we shall see much more sparingly exercised, the allowance of proofs on commission.

It is equally undeniable, however, that there must, under any system, exist a class of cases, — for instance, damages for assault, false imprisonment, libel, and seduction, and other injuries to person, character, or estate, and questions of motive and intention inferred from conduct or circumstances, — in which the "verdict of good and lawful men of the

¹ 13 & 14 Vict. c. 36, secs. 14, 46, 47, 48, 50.

vicinage" is both infinitely more satisfactory to the parties, and more conducive to the public benefit, than the studied decision of any individual Judge, however learned or discreet.

Applied to such cases when important, and perhaps limited to them, we cannot help thinking that local jury trial would be preferable to the present system. Nay; that many questions which suitors at present take to the Supreme Court, as the only means of "putting themselves on the country," would be brought before the local judicatures, if a jury were accessible. For this there seems no difficulty of a technical description, inasmuch as juries have, from time immemorial, been summoned before the Sheriff for criminal trials; and one simple form of precept may be adopted for both civil and criminal cases, to legalise the same jury in both sets of trials. It may be answered that by statute, cases involving the amount of 40*l.* may, as the law at present stands, be advocated for the purpose of being tried by a jury in the Supreme Court.¹ Here, however, the paucity of resort may be adverted to, as showing how little this benefit is appreciated by the public. If summary jurisdiction be extended to any considerable amount, it is possible that such modifications will be made as to render necessary the repeal of this clause, and the substitution of something more efficacious in its place. And when it is considered that the expense and delay of Supreme Court jury trials are altogether disproportioned to the amount in dispute in the general run of Sheriff Court cases, the conclusion will be inevitable that, if in any such cases there is to be jury trial at all, it should be at hand in the speediest and cheapest way.

There will no doubt be the old objection of "immaturity of practice;" but this, at least, will not now be held to apply to the principal Sheriffs; who, by their required attendance on practice at the Metropolitan Bar, are conversant with trial by jury in the highest place. If it be urged against the *resident Sheriffs*, who have not this advantage, and the Local Bar, we can only say that the same "immaturity" will last for ever, if no commencement of a better system be attempted.

¹ 15 & 16 Vict. c. 76. s. 105.

As the times change, so will the Profession; and when the demand arises for the exercise of talent and skill, a fresh generation of spirits will be called up, whose professional existence, under the old slow process, would perhaps never have been heard of. The County Courts of England are a more recent institution than the Scots Sheriff Courts. Yet, in any case above 5*l.*, the plaintiff may demand a jury. Though the public satisfaction with the summary determinations of the County Court Judges has rendered the proportion of jury trials very inconsiderable, enough has been seen to ascertain that there is no defect either on the part of the Bench or Bar. The same has been proved in the colonies, where questions of the highest magnitude are intrusted to men who conduct the whole business of trials before juries with credit to themselves and satisfaction to all, yet whose training in that department of practice has been altogether in the colonial arena. The Local Courts of Scotland must come short of what they are reputed, if it be found otherwise here. Indeed, as in a question of this kind the general voice is a better criterion than any which may possibly derive colour from class interest or prejudice, the following testimony to the fitness of the local Profession in Scotland appears to be conclusive¹, on the part of those who would be most immediately affected by the change: —

“The Sheriff Courts were established at a period when the Committee believe it was hopeless to look for the most ordinary legal qualification, except in the metropolis of the country. Local Judges, however, were essential; and it was necessary that those who could be obtained should have direction in point of law, and that the station of the office should be otherwise supported than by them. The Local Bars had then no weight, but required correction and support. The case is now very different. There are upwards of thirty resident Sheriffs members of the Bar; the other occupants of the office are able and experienced men; and although the metropolitan practice of the former may have been limited, their local practice, the Committee have reason to believe, has, in most instances, supplemented their original legal education. The general education and personal condition of these

¹ Report of London Committee of Merchants for Assimilation of Law.

magistrates render them independent of metropolitan support. The Local Bars, too, have men amongst them who could conduct, with learning and honesty, any legal investigation whatsoever, whilst their general character is justly respected throughout Scotland."

As, however, it is certainly desirable that the highest legal assistance and counsel should be attainable which the occasion may require or admit of, it might be provided that the sittings be held at such times and places,—as the assizes, for instance,—when the Supreme Court is not in session, when the principal Sheriffs are, in the course of duty, necessarily in the provinces to attend their respective circuits, and when Edinburgh advocates may not find it inconvenient to be retained.

If the principle of assimilation to the practice of the Supreme Court in Sheriffs' ordinary cases be fully carried out, there would appear no reason why a direct review should not be had at once before the Judges in the Inner House, without any intermediate proceedings in the Outer House;—the Sheriff, in causes within his competency, coming in place of the Lord Ordinary, in causes originating in the Court of Session. By such means a great saving of expense and delay would take place, and all the objects attained at once which can only be arrived at, at present, by a very circuitous course.

2. *Summary Applications.* — "In all cases which require *extraordinary despatch*, and where *the interest of the party might suffer* by abiding the ordinary *induciae*, application by summary petition may be made to the Sheriff, who, on considering the petition, may, if he see cause, order it to be served and answered within such *induciae* as he may think proper. And the procedure in such cases shall not abide the ordinary course of the Court days, it being always competent to pronounce such interim order as the exigencies of the case require."¹

It appears that, except in the preliminary steps, the same course of procedure is followed in these "summary" as in

¹ Act Sed. 1839.

ordinary cases; a record being made up and closed, and frequently a "proof on commission" led, before a final decision can be had, with the same rights of reclaiming and appeal, so that many months not uncommonly elapse. It is suggested that cases of this description are especially adapted to oral and continuous proceedings, and that the so-called "summary roll" should be disposed of in the same manner as small debt cases; subject to the power of the Court to remit to the "ordinary roll" any cases in which special circumstances arise.

3. *Maritime Causes.*—A similar suggestion is applicable to what are known in Law as "Maritime causes," which, on the abolition of the late High Court of Admiralty of Scotland, were transferred to the Sheriffs¹, but for which the ordinary procedure of these Courts is unadapted in point of prompt adjudication, essential where transactions relative to ships are concerned.

4. *Small Debt Claims.*—This invaluable jurisdiction is the model and prototype of the English "County Courts," and has a mode of procedure equally summary, and very similar in many respects. It remains, however, as originally restricted to the sum of 8*l.* 6*s.* 8*d.* The recent extension of the County Courts to entertain suits up to 50*l.* (and, indeed, involving *any amount*, as well as *real property* questions, when *parties consent* to submit to the jurisdiction) has given rise to a very prevalent desire that this jurisdiction should be enlarged, and there is a wide support for an extension to the *like competency* as in England. Much as the English County Courts have given satisfaction, they are not more the object of general estimation than the Small Debt Courts of the Sheriffs of Scotland. It is impossible that a jurisdiction which has been found so useful can longer continue so limited in its extent.

If the ordinary procedure before Sheriffs were not to undergo any material modification, we should be prepared to go the whole length which has been claimed, as the only way of escape from present evils, and as opening up to the public

¹ 1 Will. IV. c. 69.

the advantages of *vivâ voce* summary hearing, proof, and adjudication, as far as can be carried. If, on the other hand, any thing like the preceding suggestions be adopted in practice, the question of *amount* will be comparatively unimportant.

There is this difference between the case of England and Scotland, that in the former, until the establishment of County Courts, there was nothing for the public between the Superior Courts and the 40s. or 5l. Courts of Requests. Even now, in absence of *consent*, all demands exceeding 50l. must go to Westminster Hall, with the incident expense and delay. Hence the eagerness with which, to avoid such a consummation, the suitors have rushed to the County Courts, where their claims can be recovered and their differences settled in a prompt and easy way. In Scotland, however, there have all along been the Sheriff Courts for the local administration of justice, with a jurisdiction extensive and multifarious, but well-defined; and though admitting of improvement in many points, more accessible than the Court of Session. Much of the advantage contended for in the extension of the Small Debt jurisdiction would be attained by perfecting the existing Ordinary Courts¹; even the application to them by Act of Sederunt of that provision of Lord Rutherford's Act which enables the Judge of *consent* to try cases before himself, without a jury, on his own notes of evidence taken orally in open Court, would go far to meet the end desired.

There is undoubtedly a *certain* amount under which it would not be worth while to proceed in the Ordinary Court, even as ameliorated, the only measure of which is the expense and risk. To recover a small sum of money, men will not enter on a course by which they must, even if successful, defray almost as much, and if the reverse be subjected in more than double. It must therefore depend on the cost of ordinary proceedings what amount ought to be reached by the Small Debt Jurisdiction, and, probably, the average expense of ordinary contested suits, or something more, would be the best criterion.

¹ 13 & 14 Vict. c. 36. s. 46.

Irrespective of amount, there must be a large range of cases, chiefly of the industrious classes, in which despatch and simplicity are of more consequence than judicial precedent, and where the discretion of the Court would rather be relied on than the most perfect legal machinery on unapproachable terms. These appropriately fall within the province of a Summary Court, adjudicating "according to Equity and good conscience."

Our proposal, therefore, would be, that the Small Debt Court should be amalgamated with the Sheriffs' Ordinary Court, maintaining, as at present, a distinction between the "Ordinary Roll and the Summary Roll," but with power to the Court to remit from each to the other, as the nature of the case may appear appropriate to one or the other course of procedure. That subject to this remit all claims, up to the amount to be defined on the principle before stated, together with such cases as at present commence *on Petition*, and all maritime causes, be "Summary," and disposed of *vivâ voce* as claims at present in the Small Debt Courts, and that all others be conducted according to the "Ordinary" course of proceeding, with the suggested amendments.

With such Summary Procedure, Jury Trial, and the nice questions which must arise as to the demarcation of the distinct provinces of Judge and Jury, of Law and Fact, and of the incidents applicable to the setting aside of verdicts and granting new trials, seem incompatible. It is true that in the English County Courts there may be a jury of *five*. But this is not such a number as to ensure weight to the deliberations of the Jury-box, and it seems to have originated in circumstances peculiar to the Common Law Jurisdictions. Accordingly it is a privilege which exists little more than in name, as the Returns show that it is rarely taken advantage of by suitors. It does not therefore seem to be a part of the English system which it would be desirable to copy.

Yet, in case it should be deemed that the jurisdiction as proposed to be extended is too much to be left to the control of a single Judge, and inasmuch as the vast number of cases for summary determination must call for the combination of

care with promptitude, and as without an undue division of responsibility the anxiety of the Judge may be much relieved by *conference*, it is suggested whether, in cases of a difficult nature, or involving questions of custom or skill, the presiding Judge might not be assisted at the trial or hearing by two *lay associates*, magistrates, merchants, or men of skill, to sit by rotation, or be selected according to Standing Rules by the Court, subject, if not magistrates, to challenge by the suitors; the majority to decide.

Such a mode of adjudication is in practice in the High Court of Admiralty of England, and has been found well adapted for mercantile and maritime questions. It has also found favour with the Chancery Commissioners in matters of account¹, and in some of the Colonies² tribunals on that principle have been found to work well in minor causes both civil and criminal, superseding not only Courts of Request, but also the Quarter and Petty Sessions of the Peace.³

When such a mode of trial is had, there need be no appeal, except for matter of Law and Equity, or the admission or rejection of evidence, and then only on a special case stated and certified by the presiding Judge.

But from the decision of any *single* Judge in summary causes it would seem necessary to provide a General Appeal on the whole case, such evidence only being offered as was before the Primary Court, the notes of the presiding Judge certified by himself being conclusive against the parties, but with power to the Court of Review to have up any party or witness to be re-examined for its own satisfaction.

It has been contended, that the mode of appeal established by the English County Court Act of 1850⁴ should be adopted, by which two or more of the *Puisne* Judges were to sit out of term as a Court of Appeal. But that has now been repealed by the "Farther Extension Act"⁵ of last Session, and appeals from County Courts are now to be heard by the Superior Courts of Common Law as *part of their*

¹ Chancery Report, Appendix.

² Ordinances of South Australia.

³ No. 1. of 1850, Advocates' Library.

⁴ 13 & 14 Vict. c. 61. sec. 14.

⁵ 15 & 16 Vict. c. 54. sec. 2.

ordinary business during Term, or by any two Judges out of Term.

As more in accordance with the constitution of the Scottish Courts, the mode of appeal prescribed by the Consolidating Statute for regulating the Civil Bill Courts of Ireland will be found to afford a very useful precedent.¹ These appeals are to the next Judge of Assize of the respective counties.

Another convenient mode of appeal suggested for summary cases is on the precedent of the existing Registration Appeal Courts under the Reform Acts, where three Sheriffs review the decisions of one. This would be of perfectly easy adoption, by slightly modifying machinery in actual operation, and it would possess the advantage, preferably perhaps to all others, of local accessibility and moderate expense. There is already an appeal to the *Justiciary Court* on Circuit, but if one may infer from the paucity of resort to such appeals, it would appear that there is some imperfection in the system, or that it has not been found satisfactory. If it be, as may be gathered from a recent Report², that the Judges in Circuit have no power, at least in summary causes, to interfere on the merits, where the proceedings are *ex facie* competent and regular, there would be room for improvement on this mode of review. It would in fact be no *appeal* at all, but merely the usual control of Superior over Inferior Judicatories, that they do not exceed their jurisdiction, or unduly pursue their powers; and a variety of other objections have been urged to these appeals, as at present conducted, from which it would seem that an entirely new mode should be provided.

A review now exists by advocacy on certain specified grounds, but there might be a danger of overwhelming the Court of Session if the gates were thrown indiscriminately open in all questions. It would be better that the calm judicial propriety of that tribunal should not be startled by too great an obtrusion of summary cases, and that some

¹ 14 & 15 Vict. c. 57. s. 127. and 138.

² Inverness Circuit, Sept. 1852,

prompt and easy *local* means should exist of obtaining the advantage of review by oral proceedings in open Court in the gravest and most satisfactory manner that circumstances will allow.

It has been very strenuously advocated, that the *status* and emoluments of Sheriffs Substitute should be enhanced, and that the Sheriff Principal should no longer be required to be in attendance on the Supreme Court, but should also be resident in their counties.

On the first point there would appear to be only one opinion. The extensive testimony given to the merits and claims of the Substitutes is such, as it is hoped, will not be disregarded by those who have the power to give stability to the influence and usefulness, and to improve the position, of this highly estimable class of Local Judges. On the second it is only our part to say, *non nobis tantas componere lites*; but if it be deemed that policy dictates the maintenance of the condition which requires Principal Sheriffs to be in practice at the Bar of the Supreme Court, still it is apprehended that the present mode of appeal from the Substitute to the Principal, which is altogether indefensible, should be abolished. The great importance of diminishing the mass of written pleadings seems to suggest, that under any circumstances the argument on appeals should be *vivâ voce* in open Court, and without the continuance of a system which has given great public dissatisfaction, there are yet many matters, which by distribution of duty might with advantage be reserved for the peculiar attention of the Principal Sheriffs, or respecting which, at least, the suitors should be enabled to avail themselves of their supervision *on the spot*. We may instance the important steps of adjusting records and issues, advising on special cases, and presiding over Civil Trials by Jury.

Nothing perhaps can better show the inconsistency of this kind of appeal than the circumstance, that while Sheriffs Substitutes have a defined legal qualification for office, and their whole proceedings are subordinated in this manner, the Courts of Royal Burghs and Burghs of Barony, which have no such qualification, and may have no legal adviser but the

clerk, may exercise the same jurisdiction without any review but that of the Supreme Court. The Acts of Sederunt of Burgh Courts will be found to be almost in the same words as those regulating the Sheriffs, — the only difference apparently being, that every step of the resident Sheriff may be set aside on appeal to his principal.

It is certain that the duties of the resident Sheriffs will be greatly increased by the proposed extensions; and to these may possibly be added a further jurisdiction in Bankruptcy, in contending for which the London Assimilation Committee have the following passage in their Report: —

“The English Bankruptcy Court is a Court of Law and Equity. This is just what the Scotch Sheriff Court is. The resident Sheriff exercises jurisdiction, legal and equitable, without distinction, to an unlimited extent within the territory of his county. In Lanarkshire, Midlothian, Forfarshire, Aberdeenshire, the Bankruptcy business will require either separate Judges devoted to Bankruptcy, or a great number of Sheriff Substitutes; but in all the other counties in Scotland, the resident Sheriffs have sufficient time to do the work.”¹

It seems unnecessary to go farther into what has been written and said on this part of the subject; as on a review of the whole, it does not appear difficult substantially to meet all reclamations without any violent shock to existing interests. The question is this; — how came the counties thus singled out to require more extensive provision for the administration of justice than all others? Because they are the seat of the *great towns* — the rapid increase of which in population and trade have, in the language of another writer, “outgrown their legal establishments,” Edinburgh, Leith, Glasgow, Dundee, and Aberdeen. It cannot be alleged that the ancient Burgh *Jurisdictions* are adequate to the requirements of these marts, or that they should be maintained in their present state. Nor is it altogether right that the whole provision for administering justice there should depend upon the counties. Nor will it be contended that the situation of county towns and the existing limits of counties are the

¹ London Assimilation Com. Rep. p. 23.

best adapted for dispensing justice to the inhabitants. For many purposes of police and criminal investigation, as well as to secure tribunals sufficient to meet the demands of a trading community, it is important that, independently of the *County Courts* properly so called, there should be a sufficient legal magistracy *resident in the towns*, and towards which the Burgh revenues should contribute at least a proportion.

With the least departure from that uniformity, which it is desirable to preserve, and with the least interference with approved judicatures, the following course is suggested as practically obviating all difficulties, and as being not without precedent.¹

Let any burgh or district of burghs desirous of a Court of Local Jurisdiction, petition the Queen in Council, and let Her Majesty be empowered, after reference to the Judicial Committee, if such petition be opposed, or without such reference if unopposed, by order in Council, to constitute such burgh or district a *separate* Sheriffdom, to assign the limits of a convenient territory in and near such burgh or district, within which such local jurisdiction may be exercised; and to declare all other concurrent jurisdictions within such limits to be abolished. Let Her Majesty also be empowered to appoint a sheriff to administer justice therein, having the qualifications now required by Law for Sheriff-Substitutes, such Sheriff to be exempt from any Statutory requirements as to practice at the Bar, and to be resident within the bounds.

In conclusion, the suggestions now advocated for the amelioration of Civil Procedure in the Scottish Courts, may be summed up in the following *resumé*:—

1. That the mode of preparing Records by summons and defences be abolished.
2. That it be no longer necessary to annex to the summons a condescendence of the allegations of fact and pleas in law in support of the action.
3. That (except in special proceedings for which distinct

¹ Vide 15 & 16 Vict. c. 54. s. 7.

forms may be appointed) the summons be a simple writ or warrant for citation to appear or suffer decree by default, with a notice to the defendant annexed or indorsed, of the amount and particulars of the demand, or relief claimed.

4. That no further Record be required, unless appearance be entered for the defendant.

5. That on entering appearance, the defendant may dispense with a Record being made up, and intimate his assent to any agreed course of proceeding; and the case may then be disposed of in such manner as the Court or Judge on motion may be pleased to order.

6. That if no such consent appear, a Record be prepared, consisting of a "case," or single paper on each side, framed in articulate numbered allegations, answered by admission or denial under corresponding numbers, according to the existing rules for the preparation of condescendence and answers.

7. That at any stage before or after making up a Record, the Court or Judge may order the examination of either or both parties, in general, or on any particular points.

8. That in ordinary civil causes before Sheriffs, the procedure be entirely assimilated to the practice of the Supreme Court.

9. That all applications now competent by Petition, and all maritime causes, be disposed of by *vivâ voce* summary hearing and procedure in the manner now used in the Small Debts Court.

10. That the Small Debt Jurisdiction be extended in amount.

11. That the Ordinary and Small Debt Courts be amalgamated, with power to the Court to remit from the "Ordinary" to the "Summary Roll," and *vice versâ*, such causes as from special circumstances may be deemed more adapted for one or the other course of procedure.

12. That ordinary causes before Sheriffs may pass for review to the Inner House direct, in like manner as causes originating in the Court of Session from the Lord Ordinary.

13. That summary causes may be appealed to the next Judge of Assize, or to *three* Sheriffs, as in the Registration Appeal Courts.

14. That the Queen in Council may, on the petition of any burgh or district, erect the same into a distinct Sheriffdom, with convenient limits. And Her Majesty may appoint a Sheriff, to administer justice there, without condition of practice at the Metropolitan Bar, but to be resident within the bounds.

On closing this cursory survey, the writer will now take leave.

Before these observations can meet the public eye, in all likelihood he will be far from the scene of controversy; but present or absent, he will view with unabated interest the advancement of his profession and his country. And though the chosen and appropriate sphere of his labours must be distant, yet, if he can carry with him the cheering reflection, that he had in his wanderings planted or watered to the yielding of good fruit, he will go forth on his way rejoicing.

ART. II.—COUNTY COURTS AND THEIR CLAIMS.

Remarks on Government Bounties to the Superior Courts, with Observations on the Claims of the Suitors of the County Courts to an equal Participation in the Public Funds appropriated to the Support of the Administration of Justice. In a Letter to the Editor of the Law Review by a Judge of the County Courts.

DEAR SIR,—It is with much satisfaction I have learned that the attention of Lord Brougham has been directed to the subject to which this letter relates. Within the entire range of our institutions there is no greater abuse; and it is one of which the continuance cannot be extenuated, because there exists a power at present (without further legislation) of equalising or removing those burdens which are now so unequally, and therefore so unjustly, distributed; for the fees of the County Courts are open to be regulated or reduced by the Government authorities.

Were any European Government to establish simultaneously two Jurisdictions, one having cognisance of the complaints of the poor, and the other possessing authority over the claims of the wealthy; and to endow the rich man's tribunals with ample resources out of the revenues of the State, but to leave the Courts of the poor to be maintained by themselves, what judgment would be formed by enlightened and impartial men of such a transaction? It must be superfluous to suggest what that judgment would be.

In the delineation I have just given, I have literally described the actual relative positions of the Local Jurisdictions of this country on the one hand, and of the Superior Courts on the other; which (viewed in relation to financial considerations) present anomalies and contrasts characteristic of the middle ages, when popular rights were habitually and openly trampled under the feet of the privileged few. Will it be readily believed, even a single generation hence, that in the age in which Lord Brougham and Lord Denman lived—in which the enlightenment and elevation of the mass of the people had become an object of general concern—in which the equitable equalisation of taxation had become the declared aim even of the original advocates of protective duties, and the reform of the laws the pursuit of the leading members of the legal profession,—will it be believed, that at the period at which I write, such things could have been!

Inequalities, which in the feudal times the spirit of tyranny might have created, have been permitted in our days through oversight on the part of our rulers, and imperfect information on the part of our people. But it will be obvious, that the further continuance of grievances so flagrant as those to which this communication relates, is utterly inconsistent with the impartiality of our Government, the purity of our laws, and with that sense of justice which governs the public opinion of the British community. Though it must be superfluous for me to mention that fact to you, there are doubtless many of your readers who are not aware, that while the Judges and Officers of the Superior Courts of Law are supported out of the public treasury, the funds by which the

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system of County Courts is maintained are derived exclusively from fees exacted from the suitors in those Courts. §

A mere general statement of the nature of so palpable an injustice must suffice to ensure for it the condemnation of every unsophisticated mind.

It is, however, my intention on this occasion to go a little into detail: as, in some instances, the fees or Court Taxes levied in the County Courts are of a peculiarly objectionable character. Of these I shall furnish a few examples.

1. *The costs of imprisonment.*—I need hardly remind you that the Law of Imprisonment for Debt, as regards sums under 20*l.*, has gone through many phases. At one time, the power of imprisonment in such cases was abolished altogether, to the injury of the creditor and with great detriment to the morals of the community — for the majority of those who contract small debts are labouring men who have often no tangible property except such as might be easily secreted; and for that reason mere executions against their goods were easily evaded by fraudulent defendants. Hence, in the County Courts Act, imprisonment for debt was partially revived by a clause which seems to me to hit the proper medium, and is, in my humble judgment, the very keystone of the Act; for it is against fraudulent debtors that the provisions of such Acts are chiefly needed.

The measure alluded to gives the Judge of the County Court the power of imprisonment, confined to those cases in which the debtor, who has failed in payment, has been guilty of some act which brings his conduct within the category of crimes; — such as obtaining money under false pretences, fraudulent assignments to evade executions, contracting debts without having any reasonable prospect of paying them, &c.

Will it be credited that the County Courts Act throws on the plaintiffs the expenses of these proceedings for the imprisonment of fraudulent debtors — proceedings which belong to the class of criminal prosecutions — as plainly as do indictments tried at the Assizes or Quarter Sessions? When the plaintiff is poor and the defendant tricky and roguish, the

dread of the expenses alluded to commonly deters the former from applying for an order of imprisonment. After having paid all the costs of obtaining a hearing and judgment, he generally shrinks, and very naturally, from any further outlay, preferring the sacrifice of those costs (in addition to the loss of his debt) to further risks and expenses by which he considers he should be merely throwing "good money after bad."

Very vicious in some respects will ever be the workings of any system of Law which is founded on the false assumption, that the benefits of Courts of Justice are confined to the parties to the particular actions that may be brought in those Courts. The prevention, and not the mere cure, of injustice must be the end of every soundly constituted tribunal.

Were the cost of imprisonment of fraudulent debtors undertaken (as it ought to be) by the State, there would be very few cases of imprisonment; for the knaves who trifle with the poverty of their creditors would rarely venture to provoke the iron grasp of official authority.

2. *A very enormous tax is levied in the County Courts to meet the expense of the buildings used as Courts, of clerks' offices, books and stationary, &c.*—While Courts are found for the Judges of Assize, and for the magistrates at Quarter Sessions, either out of the Public Treasury or out of the Funds of Counties, the poor suitors in the County Courts are compelled to pay, and most exorbitantly, for the use of the very buildings in which they have to seek justice!

In the year 1852 it appears that upwards of 41,000*l.* was raised for the purposes alluded to, under the name of the "General Fund." (See Returns to the House of Commons obtained by the late Mr. Grainger, M. P.)

The grievance now under discussion was partially redressed by a provision of the "County Courts Extension Act," which entitled the County Courts' functionaries to the use of Town Halls rent free. But in many—I believe in the great majority—of the rural districts there are no Town Halls, which still renders it necessary either to build a Court, or to contract for the use of a building with some private indi-

vidual. In such cases not unfrequently a most illiberal spirit is exhibited by the proprietor, though probably he may himself be the very person in the whole district to whom a Local Court may be most largely beneficial. Not very long ago I was asked to give my approval and support to an arrangement for the alteration of a building used as a Court, and to some improvements in an inn which belonged to the same proprietor, on the understanding that he was to be reimbursed the attendant expenses by means of a large increase of rent out of the "General Fund" of the County Court. These changes would have made the Court to a trifling extent more convenient to the Judge, and they would have largely improved the private property of the landlord, one of the most extensive landowners in the kingdom, and who, as the chief agricultural proprietor in the district, obtains from a Local Court, in the facility of recovering his rents, and in the check it affords on improvidence and bad habits in a population intimately connected with his interests, advantages compared to which considerations of rent are of trifling moment. The building alluded to is not commonly used as a Court more than a few hours in each month. In reply, I sent an intimation that, if the further use of the building for that purpose were to depend on a compliance with the arrangement suggested, I should venture to recommend to the Government authorities (instead of acceding to those terms) to withdraw the Court from the place; and I heard no more of the proposition. Here let me observe that I should be conveying to you a very erroneous impression were my narrative of the incident I have just noticed to lead you to the inference that the individual I have alluded to is one whom I consider as illiberal or ill-intentioned. He is undoubtedly kindly disposed and anxious to promote the welfare of his neighbours and dependents. But for that very reason, the incident referred to is more cogently illustrative of the conclusion I wish to present to you, viz., that the continuance of an unjust system on the part of the Government of this country almost uniformly produces a twofold injury; in the first place, by the infliction

of direct injustice, and in the next by the indirect influence of a bad example. Hence it is that the very same men who are ever ready gratuitously to afford every facility and encouragement to all ordinary meetings for public objects of utility or of social enjoyment, are very commonly found to act in relation to the institution which is the subject of this letter, in a spirit quite inconsistent with their usual sentiments and habits. They appear to take their tone from the invidious and equivocal footing on which they see the Local Jurisdictions of the country placed; viz., excluded from their natural and proper place, as a part of the national institutions of the country — left to stand or fall by a self-supporting agency, like some religious sect that is permitted, not approved; coldly tolerated, but not assisted or endowed, by the State.

In not a few districts the County Courts' authorities have been driven, either by the demands of the owners of buildings or by other causes, to erect Courts on purpose for the sittings. Now observe the disastrous burdens that must in such cases be thrown on the "General Fund." In most districts the sittings do not occupy more than one day in each month. If, therefore, a separate Court be erected in such a case, the expenditure, in relation to the advantage, is perfectly ruinous; for I need hardly state the self-evident truth that the cost of such an erection must be the same, whether constantly occupied or used only for a few hours in each month. Hence a heavy and most unfortunate drain on the funds of the Local Courts.

While explaining the injustice of the present system in the abstract, I feel bound in duty to express my personal acknowledgments of the great kindness and consideration I have so often experienced from the Government authorities, who have repeatedly shown a willingness to erect new Courts, even without solicitation on my part, in those districts in which the existing Courts are inconvenient or confined, and likely to prove trying to the health and strength of the Judge who has to preside in them. I feel it incumbent on me to express my thankfulness for the appreciation they have ever shown of the character of the circuit which is the scene

of my labours — its extensive surface, mountainous roads, and boisterous and variable climate — and I believe they will, therefore, not fail to understand the motives which have induced me to prefer to endure for a time some amount of discomfort and inconvenience rather than involve the Court funds in expenses which I consider so injurious; and I may here venture to suggest that there are probably few districts in which the expenses of erecting a Court might not be avoided by an arrangement for the use of one of the public schools, for in rural districts the sittings rarely occupy more than a day, which in each month is less than is required as a holiday for the necessary recreation of the children. On future occasions schools receiving Government aid might be constructed with reference to both objects, and whatever rent were paid by the County Courts' authorities would be thus rendered conducive to a beneficial public end, as it would serve to increase the funds expended on education. In one of the districts of my circuit an arrangement of this kind has been entered into, in order to avoid the expense of erecting a separate Court, and for the reasons above mentioned. It has proved a great mutual advantage — to the County Courts on the one hand, and to the school on the other. Though some difficulties of a local nature have been suggested against its continuance, it affords an equally good example of the importance and value of the "co-operative principle," as applied to public institutions. By the general adoption of that principle, the demands which require the establishment of a general fund might, to a great extent, be extinguished.

3. *In country districts of wide extent, as the bailiff's fees on the service of summonses are in proportion to the distance of the defendant's residence from the Court, a very heavy burden is often thrown on the latter.* — This is quite contrary to the very principle of Local Courts, which aim, as far as possible, at making justice equally cheap and accessible to all. This grievance is the result of a comparatively recent change.

I cannot refrain from expressing my unfeigned surprise at the efforts that have been lately made to subject the suitors of the County Courts to a large increase of attor-

neys' fees, and that, too, at the very time when equally vigorous efforts are being made to reduce the expenses of the Superior Courts. As if it were not enough that the parties in Local Courts — though belonging to the poorest classes — are made to pay the entire cost of the jurisdiction from which they have to seek redress.

Since the establishment of Local Courts great and very laudable have been the exertions made, and not inconsiderable have been the sums expended, in the improvement of the superior tribunals of this kingdom. Public money is never better employed than in reforming the administration of justice. But even in reforms it is quite possible to observe an order of proceeding that may fairly justify comment and invite observation. However advantageous to the welfare of the suitors in those Courts — however consonant with the opinions, and however conducive to the interests of the legal profession — the remodelling of the Superior Courts may, under existing circumstances be, that object has plainly no public claims to priority. At least equal attention is due to those Institutions which Lord Denman has truly described as the Courts of general resort — the only tribunals of the kingdom which, like the railway and the steam-boat, largely influence the affairs and prospects of the entire people.

For the interests of truth, as well as for the sake of justice, it is necessary that the principle of Local Courts should have a fair and equal trial in comparison with other jurisdictions of a different constitution.

I entertain no doubt that immense as are the number of cases disposed of in those Courts, there is also an immense number in which justice is still suppressed, owing to the effect of the present fees in deterring parties from proceeding. Very trifling is the benefit which the Government of this country derives from those fees, compared to the national advantages which a still cheaper jurisdiction would afford, in checking improvidence and its fruits, pauperism and crime. Apart from higher considerations, can it be doubted that even the public revenues would be benefited by the change; for the resources of the country, and the national wealth from which they are derived, are obviously dependent on the

prevalence of habits of frugality, prudence, and honesty among the people?

Simultaneously, in point of time, with the claims to which the County Courts have given rise, has been the occurrence of changes in the position of other tribunals — changes which manifestly call for a reduction or revision of the public expenditure hitherto appropriated to their support.

The Superior Courts of Common Law have been relieved of a very large portion of their business by the new local tribunals. In many counties the civil business of the Assizes has been all but extinguished; in some of the smaller counties there have lately been only two or three causes in a year, and in others none whatever. Under these circumstances, it may reasonably be suggested, that the time has arrived for a reduction (as vacancies occur) in the number of the Judges of the Superior Courts of Common Law, which has been increased in our own times. It may be fairly pointed out that the public interests seem to require that their valuable time and labour should be exclusively devoted to questions of great magnitude and importance, and that the ordinary legal business of the country should, for the most part, be handed over to the tribunals which form the subject of this letter.

While in Chancery the business of each Court is disposed of by a single Judge, in the Common Law Courts the time and attention of several Judges are frequently occupied simultaneously on the same case — very frequently a matter of less importance and difficulty than the questions that usually occur in Equity suits.

It may be worthy of consideration whether much — if not the whole — of the chambers' business of the Superior Courts of Common Law may not be transferred to Judges of the County Courts or to functionaries holding an analogous position.

The concurrent jurisdiction of the Superior Courts, in cases within the jurisdiction of the County Courts, should, I conceive, be abolished, as well as the power of removing cases from the latter to the former tribunals by Certiorari. Both powers are essentially inconsistent with the acknow-

ledged necessity of cheap and accessible tribunals in cases of moderate amount — an advantage of which they frequently deprive, by a species of surprise, suitors quite unprovided with means adequate to sustain the expenses of a Superior Court — suitors of that very class for whose relief Local Courts were especially intended. The establishment in the County Courts of an Equity Jurisdiction (original and auxiliary) is, I venture to think, indispensable to the real and *bonâ fide* redress of the grievances of Chancery suitors; indispensable also to the termination of the progressive expenditure of public money on the Court of Chancery, on which such enormous sums have from time to time been lavished; for it may reasonably be anticipated that, without the aid of Local Courts, a further addition to the present staff of Chancery Judges and officials will ere long be inevitably required. And it may also be fairly anticipated that, with that aid, the Legislature may be enabled again to reduce the number of Chancery Judges, which it has been in our times induced largely to increase.

Independently of these considerations, a Local Equity Jurisdiction is indispensable, for a Metropolitan Court of Chancery is, from its very nature, inaccessible to poor suitors; and it will be impossible to make it cheap to country districts by any amount of public "bounties" that may be bestowed on its machinery. You will also bear in mind that, without local trials, you will never get rid of written evidence — in the opinion of Lord Langdale and other learned authorities, the fundamental vice of the Chancery system.

As a general rule, it is obviously desirable that the functions of the less expensive class of Courts should be extended as much as possible, and the limits of the higher and more costly order of tribunals circumscribed within comparatively narrow limits. For this reason it would, I think, have been better had Lord Brougham's Local Equity Bill been passed in the first instance, previously to the late augmentation of the judicial force in Chancery, with which it might have served to dispense.

Hitherto there has been a tendency to meet plans for simple and cheap Courts by counter-projects founded on

expensive changes in the Superior Courts, or by objections in detail.

The consolidation of the Country Bankruptcy Courts with the County Courts, would effect a large saving of expense, at the same time that it would, as I believe, render the Bankruptcy Law more efficient in practice, as a security against fraud, and as a resource against blameless misfortune.

Any improvement in the administration of the Bankruptcy system, which should afford even a partial check on the waste of property caused by Bankruptcies (involving, as has been calculated, a great many millions annually), would be a great national blessing, with relation to which the cost of the legal machinery employed would be undeserving of consideration.

Charities may be beneficially placed, to a large extent, under the control of the County Courts; and their funds may be made to contribute to the expenses of maintaining the machinery of those Courts on grounds that do not apply to private suitors. As charities are in reality property devoted to public purposes, there is, I conceive, no hardship in drawing from their funds the expenses of management, legal redress and superintendence, rather than out of the general taxation of the country. This burden would press lightly on individual charities, and considerably increase the resources of the County Courts' Jurisdiction.

I consider it obvious that unlimited jurisdiction should be given to the County Courts (as proposed by Lord Brougham), in all cases, whether at Law or in Equity, in which the parties may mutually consent to abide by their decision. The objection urged by Lord Campbell to that proposition, viz. that parties would never avail themselves of such a vision, is founded on an erroneous assumption. It is well known that suitors have, in many cases, submitted disputes involving affairs of magnitude to the decision of a Judge of the County Courts, by means of a kind of "amicable suit," nominally instituted for a small amount, but brought to trial on an understanding (binding in honour), that the decision was to govern the rights involved. With every sentiment of respect for the noble and learned Chief Justice, who has

uniformly exhibited a liberal and kindly feeling towards the County Courts and their Judges and functionaries, I must be excused for pointing out how untenable is any objection to the provision alluded to. On what ground are suitors to be debarred from referring their differences to the decision of a Judge, when the Law permits them to bind themselves to abide by the award of any private arbitrator they may select, possibly the most ignorant and illiterate person in the neighbourhood in which they live?

The power of granting Probate and Letters of Administration in all cases below a certain amount, should be conferred on the County Court of each district. A Judge of those Courts has peculiar opportunities of observing the flagrant injustice and oppression to which the present system in matters of this nature gives rise. How often have I found myself compelled, with the deepest regret, to decide in favour of a dishonest debtor, and against the claim of a widow or children of a poor man, for want of Probate or Administration,—of which the cost under the existing system would have swallowed up all the little property he had left. What examples do such cases offer to the districts in which they occur! Little do our rulers know of the moral taint—of the popular discontent which unjust laws diffuse. It is too much to expect the people at large to be uniformly honest and high-minded so long as the laws under which they live are not so. The precepts of the pulpit and of the school can scarcely be expected to produce their desired effect so long as they are contradicted by the actual practice of the laws that govern society.

The lighter class of criminal offences might be expeditiously disposed of in the County Courts, with great benefit to the public morals and with a large saving of public money.

There are various other matters over which the authority of the new jurisdiction may be usefully and economically extended. But I need not pursue the subject farther on the present occasion.

Important and diversified as would be the benefits which the country would derive from the extension of the County

Courts' jurisdiction to the subjects above enumerated, and to others which it would be needless to specify in detail, the additional expense imposed by additional functions would be very trifling in comparison to those benefits.

There is no greater mistake than to assume that cases of magnitude necessarily occupy more time than those which relate to small amounts and interests. Very commonly the very reverse holds good; for the accounts of ignorant and illiterate men are more frequently kept in a confused and irregular manner, than those of individuals having the advantage of wealth and education.

I do not anticipate that the various contemplated additional branches of jurisdiction would ordinarily require additional sittings, excepting in the most populous districts. For the most part they would serve to call forth the administrative much more largely than the judicial agency of the County Courts, and would tend chiefly to augment the labours, and therefore the claims, of the county clerks; a class whose remuneration in the rural districts is at present very slender, considering their official responsibilities, their position as professional men, and the satisfactory manner in which they have fulfilled their duties.

Bad as the fee system is in principle, it is even worse in practice, as applied to the County Courts, owing to the restricted limits of the field to which its operations are confined. Unlike the income-tax, which falls on all whose wealth is *above* a certain standard, this Court tax (for such it is) is confined to those whose claims are *below* a given amount, on whom, for that very reason, it throws a peculiarly heavy impost.

Like the cost of railways, the expenses of maintaining the County Courts partake, in many respects, of a "fixed" character. In other words, they do not increase in proportion to the augmentation of business. Hence, even with the present fee-system, the suggested extension of jurisdiction would tend at the same time to secure a reduction of fees and a more liberal remuneration to the local officers of those Courts. The present position of those tribunals may be compared to that of a railway company compelled by enact-

ments (the reverse of the benevolent provisions of the existing law) to depend entirely for support on the contributions of the poorest class of passengers, and debarred from those resources derived from the wealth and commerce of the country, which at present enable railway companies to confer, for a trifling charge, the benefits of their system on the humblest ranks of society.

I remain, dear Sir,

Yours very faithfully,

A JUDGE OF THE COUNTY COURTS.

ART. III. — TREATISE ON THE CONTRACT OF PARTNERSHIP, BY POTHIER.*

PRELIMINARY ARTICLE.

1. **PARTNERSHIP** is a contract, by which two or more persons put, or oblige themselves to put, something in common, in order to make therefrom in common a lawful profit, of which they reciprocally bind themselves to render each other an account.

* This Treatise, on the very important subject of Partnership, has been selected for translation, in preference to modern French works on the same subject; first, because it shows better than any other how the Roman Law has been incorporated in the laws of most European countries; and, secondly, because the French Civil Code upon this subject, as indeed, upon all others, is little more than an analysis of Pothier. The French Civil Code and Code of Commerce, together with brief notices of the Laws of England, Scotland, and other countries on the subject, are contained in the notes. This treatise will also assist the consideration of Limited Liability in Partnership, as to which see 9 L. R. p. 74., 10 L. R. p. 123., and *post*, Art. V.

¹ Partnership is a contract by which two or more persons agree to put something in common with a view of dividing the profit which may result therefrom. Civil Code of France, art. 1832. Every partnership must have a lawful object, and be contracted for the common interest of the parties. *Ibid.*, art. 1833. See Wats. Partn. 1. Coll. Partn. 2. 2 Bell's Comm. p. 613., 4th edit. Stor. Partn. 2. Code of Louisiana, art. 2772. 2775.

We shall treat in the First Chapter, of the nature of the Contract of Partnership. We shall enumerate in the Second, the different kinds of Partnerships; in the Third, the different clauses in Partnership Contracts. We shall examine in the Fourth, what are the forms which our law requires in the Contract of Partnership. We shall treat in the Fifth, of the right each of the partners has to the Partnership Property. In the Sixth, how each of them is bound by debts. In the Seventh, of the obligations which arise from the Contract of Partnership. We shall examine in the Eighth, how Partnership is dissolved. In the Ninth, we shall treat of the distribution of the Partnership effects.

FIRST CHAPTER.

Of the nature of the Contract of Partnership.

WE shall examine,—1. Wherein Partnership differs from community or partownership. 2. To what class of contracts it belongs. 3. What is of its essence. 4. What natural equity requires in this contract. 5. We shall treat of fictitious Contracts of Partnership.

§ I. *In what Partnership differs from Community or Partownership.*

2. Partnership and Community are not the same thing. Partnership is a contract, by which two or more persons

* Code of Louisiana,* art. 2777. The same distinction exists in our Law between Partnership and Community, or Partownership. In both, indeed, there exists a community of interest; in the former, however, it is the result of a contract between the parties, whereby there is either expressed or implied a community of profit and loss; the latter often either exists independent of any contract whatever, as in the case of joint legatees, or devisees, or coheirs, or at any rate independent of any contract implying a community of profit and loss; as where persons jointly purchase property, which is not to be sold for their common benefit, but to be allotted to them in distinct shares, such community of interest will not constitute a partnership. *Hoare v. Dawes*, Doug. 371.; *Coope v. Eyre*, 1 H. Black, 37.; *Gibson v. Lupton*, 9 Bingh, 297. So, likewise, although there is a community of interest between the representatives of a deceased

agree to put something in common. When in execution of that contract they have actually put in common what they agreed to do, a community certainly is formed between them; but this kind of community is also called a partnership, because it is formed *in execution of a contract* of partnership.

There is also a community which exists between several persons, without the intervention of any contract, and consequently without any contract of partnership, as when an estate has descended to co-heirs, or a legacy has been bequeathed to several legatees jointly. In these cases there exists amongst the heirs a community of the descended estate, amongst the legatees a community of the property bequeathed, but there is *no partnership* between them. A community of this kind is not a contract, but a *quasi contract*, which creates, amongst persons having things in common, obligations similar to those which have their origin from the contract of partnership.¹

3. In this alone consists the difference between partnership and community. It is a gross error to say, with the author of "The Conferences of Paris," vol. ii. p. 15., that partnership differs from community in this respect, viz. "that in partnership the capital brought in by each of the partners is not common, and that the profits only are properly common."

This is erroneous. For if partners sometimes put into partnership the use only of certain things, of which they remain each separately the owners, they sometimes also put into partnership the things which they bring into it, and render them common amongst themselves, as well with respect to property as with respect to mere enjoyment.

partner and the surviving partners, there is not, independently of contract, any partnership between them. *Pearce v. Chamberlain*, 2 Ves. 33.

Upon the same principle, where persons engage to do some particular work and receive money for it, not on a joint account or for their joint benefit, but to be divisible between them on receipt; the contracting parties, it seems, will not be partners but joint contractors. *Finckle v. Stacy*, Sel. Ch. Ca. 9. See the remarks of Wigram, V. C., 7 Hare, 174. 3 Ersk. 3. § 13. *Bell's Law of Scotland*, 133.

¹ Pothier treats of these quasi contracts in an Appendix to this treatise.

To establish this paradox, the author of "The Conferences" cites in another place these terms of Law 13. § 1. ff. *De Præscr. Verb.* (Dig. Lib. 19. tit. 5. l. 13. § 1.) "*Nemo societatem contrahendo rei suæ dominus esse desinit.*" That author has not understood the case in this paragraph. It is this; the owner of a certain plot of ground conveys the whole of it to you, upon condition that after you have built upon it you will reconvey to him a portion of the ground so built upon. *Julian* asks, what kind of contract is comprehended in this agreement? He says, that it is not a Contract of Partnership, because the owner has sold the plot of ground entirely to you, and that *nemo societatem contrahendo rei suæ dominus esse desinit*; that is to say, that he, who puts a thing into partnership, does not cease entirely to be owner of it, save only so far as regards one part of it, which he transfers to his partner by making it common; and he adds at the end, that it would be a Contract of Partnership if a part only of the land were conveyed to you.

§ II. To what Class of Contracts Partnership belongs.

4. Partnership is a contract of natural right, which is formed and governed by the rules only of natural justice.

* All partnerships must be reduced into writing, when their object is more than the value of one hundred and fifty francs.

No evidence is admissible against or beyond the contents of the act of partnership, nor concerning what shall be alleged to have been said before, at the time of, or subsequently to such act, although the question be of a sum or value less than one hundred and fifty francs. Civ. Code of France, art.

It will be observed, that the regulations of the ordonnance, which Pothier says had fallen into disuse in his time, have been retained in the French Code.

According to the Law of England, no writing is necessary to constitute a private unincorporated partnership, the consent of the parties, or their dealings from which a contract may be implied, being sufficient for that purpose; (*Peacock v. Peacock*, 16 Ves. 49.; *Featherstonhaugh v. Fenwick*, 17 Ves. 298.; *Alderson v. Clay*, 1 Stark. 405.;) and when there is an agreement in writing, it is by the unanimous concurrence of all the partners, open to variations from day to day, and the terms of such variations may not only be evidenced by writing, but also by the conduct of the parties in relation to the agreement and their mode of carrying on the business (*England v. Curling*, 8 Beav. 129. 133. 137. and see *Geddes v. Wallace*, 2 Bli. (O.S.) 270. 295. 297.); and special clauses in partnership articles, for instance, as to the mode of taking accounts, will be con-

If the Ordonnances have prescribed certain formalities for this contract, they have only been prescribed in order to serve as a proof of it, nor do they belong to its substance. Although they may not have been observed, the contract between the contracting parties is complete, and it creates between them the obligations which arise therefrom; it is only with respect to third parties that these formalities are required.

5. This contract, like those of sale and of letting out to hire, is consensual; that is to say, it is formed by the consent alone of the contracting parties, and is perfectly complete as soon as the parties have each agreed to bring something in common, although they may not at that time have actually contributed their quota.

6. This contract is synallagmatic or bilateral, for each of the parties by it engages himself reciprocally towards the others.

7. Lastly, it is a commutative contract, as each of the contracting parties expects to receive as much as he gives.

§ III. *What is of the Essence of the Contract of Partnership.*

8. It is essential in the contract of Partnership, first, that each of the parties should bring or oblige himself to bring

considered as expunged from the articles if the parties have not acted on them. *Jackson v. Sedgwick*, 1 Swanst. 460, 469.

The contract of Partnership, as it is founded on the consent of the parties, must be entered into with perfect good faith, hence, when a person has been induced by fraud or misrepresentation to become a partner, a Court of Equity will not only declare the contract to be void, but will put the injured party as far as possible in possession of his original rights and property. *Tattersall v. Groote*, 2 Bos. & Pull. 131.; *Ex parte Broome*, 1 Rose, 69.; *Green v. Barrett*, 1 Sim. 45.; *Oldaker v. Lavender*, 6 Sim. 239. *Stor. Partn.* 341.; *Coll. Partn.* 244, 245.

¹ Code of Louisiana, art. 2776.

² *Ibid.*, art. 2772.

³ *Ibid.*, art. 2772.

⁴ Every partner must bring to the partnership either money, or other property, or his skill. *Civ. Code of France*, art. 1833. *Code of Louisiana*, art. 2772. With regard to the partners, *inter sese*, our law is the same in this respect (*Peacock v. Peacock*, 16 Ves. 49.; *Reid v. Hollinshead*, 4 B. & C. 878.; 7 Dow. & Ryl. 444.; *Meyer v. Sharpe*, 5 Taunt. 74.; *Cheap v. Cramond*, 4 B. & A. 663.); but with regard to *third parties*, if a person holds himself out as a partner; as,

something into the partnership; either money or other effects, or his labour and industry. If, therefore, a trader, from affection for his niece, agrees, during a certain number of years, to give her yearly a certain share of the profit which he may make, and the niece supplies to his business nothing in return — neither money, nor goods, nor labour, — this agreement is not a Contract of Partnership; because the niece neither brings nor promises to bring anything into the partnership: it is a pure donation, which the trader wishes to make to his niece, of a share of his expected profits in trade; and it is not valid unless it were made in the marriage contract of the niece, because, according to our French law, donations of future property are not binding, except in the contract of marriage.

9. It is not, however, necessary that what each of the contracting parties brings or promises to bring into the partnership should be of the same nature. If one brings, or promises to bring, money or goods, it is not necessary that the other should, in like manner, bring the same; and it is sufficient that he should bring his labour and industry. *Societatem uno pecuniam conferente, alio operam, posse contrahi magis obtinuit.* L. i., Cod. *Pro Soc.*, Cod. 4. tit. 37. l. 1.

10. But it is necessary that what each of the partners brings into the partnership should be appreciable. Therefore, if the partners for the establishment of a manufacture should agree with a man in power to give him a certain share in their anticipated profits during a certain number of years, upon condition that he would aid them by his interest in the affairs of that manufacture, that agreement would not be a Contract of Partnership; because the assistance from the

for instance, by allowing his name to appear in the firm, or by acting in such manner as to induce the belief that he is a partner; he will, although contributing nothing to the partnership, and entitled to no profits from it, be liable as a partner to such third parties; such person is commonly called a *nominal* partner, in contradistinction to persons having an interest in the profits whose names appear to the world as, and who are, *actual* partners, for both *nominal* and *actual* partners are what are called *ostensible* partners. *Waugh v. Carver*, 2 H. Bl. 235. 246.

⁹ See *Peacock v. Peacock*, 16 Ves. 49.

¹⁰ See Civ. Cod. of France, 1833., *art.*, note 8. 3 Kent's Comm. 24.

interest of such person is not a thing which is appreciable or capable of being valued. That agreement is void, as contrary to public probity and good morals, which do not permit persons in power to barter their interest for money.

11. Secondly: it is essential in this contract that the partnership should be contracted for the common interest of the parties. When, in an agreement, the private interest of one of the parties only is regarded, it is not a Contract of Partnership, but a contract of mandate, subject to revocation. Therefore, in that case of Law 52. ff. *pro Soc.* (Dig. lib. xvii. tit. 2. l. 52.)—where, having entered into an agreement with my neighbour that he should buy an estate then for sale in our neighbourhood, and that he should give me up a certain part of it contiguous to my estate, and should himself retain the remainder, having afterwards myself purchased that estate, it is asked if my neighbour has a right to bring against me the action *pro socio*, to compel me to give him a part of that purchase. *Julian* answers that it depends upon our intention in entering into that agreement. If it was our intention to make the purchase in order that we might each derive a profit therefrom, it is a contract of partnership, which would give my neighbour the right to that action. But if our intention was solely that he should make the purchase in order to do me a favour, the agreement amounts only to a mandate, which not having been executed by him, gives him no right of action.

12. Thirdly: it is essential in the Contract of Partnership that the parties propose thereby to make a gain or profit in which each of the contracting parties may expect to have a share, in proportion to what he has brought into the partnership.

Therefore, if, by the contract of a pretended partnership, it has been agreed that the entire profit should belong to one of the contracting parties, without the other being able, in any case, to make any claim to it, such an agreement would not be a contract of partnership, and would be void.

¹² An agreement which would give to one of the partners the whole of the profits is void. Civ. Cod. of France, 1855. Code of Louisiana, art. 2785. ; *Bayley v. Clark*, 6 Pick. 372. ; 2 Bell's Comm. §15.

as manifestly unjust. The Roman juriconsults have given to this kind of agreement the name of *Leonine Partnership*, by allusion to the fable of the lion who, having made a partnership agreement with the other animals to go a hunting, secured for himself the whole of the prey. *Aristo refert Cassium respondisse societatem talem cõire non posse; ut alter lucrum tantum, alter damnum sentiret; et hanc societatem leoninam solitum appellare; et nos consentimus.* * * * *Iniquissimum enim genus societatis est, ex qua quis damnum, non etiam lucrum spectet.* L. xxix. § 2. ff. *Pro. Soc.* (Dig. Lib. xvii. tit. 2. l. xxix. § 2.)

13. It is not, however, necessary to the validity of the

¹³ In commenting on this number or section Mr. Justice Story observes, that, "Pothier has not, indeed, spoken with his usual clearness or exactness on the subject. But Pardessus has expressed his opinion in the most direct and satisfactory manner. Thus, he says, whenever a merchant, instead of a fixed salary, agrees to give to his agent a certain part of the annual profit, the agent is a letter of his services under an aleatory condition, but he is not a partner. He cannot make claim in that quality to any proprietary interest in the merchandise bought with the funds of his principal, although he partakes of the profits thereof. He cannot, at least, without an express stipulation, have any voice in the deliberations of the partnership; and he will not be subjected to the contracts of the partnership in respect to third persons, unless, indeed, he has exceeded his power, and then he is responsible as a mandatary; so when one person has trusted goods to another, to be sold for him, and has agreed to give him the whole or a part of the price, which shall exceed a certain sum, this will not create a partnership between them; but only be a salaried mandate, or commission to the agent thus undertaking the business (Pardessus, *Droit. Comm.* tom. iv. n. 969; *Id.* tom. ii. n. 306. 560.; tom. iii. n. 702.). Duvergier (*Droit. Civ. Franc.* tom. v. n. 48. n. 56.) holds the same opinion, and has reasoned out the grounds thereof with uncommon acuteness and ability. And, indeed, it seems to be the established doctrine of the French tribunals."—Story, *Partn.* 76. Our own law upon this subject is similar to the French; the great difficulty, however, has been in ascertaining whether the contract for the payment to a person of a salary, dependent on the amount of the profits, makes the recipient a partner or a mere agent. The cases upon this subject, in which very refined distinctions are taken, are very ably reviewed in 1 Smith's *Leading Cases* in the note to *Waugh v. Carver*, p. 490.; and the learned author comes to the conclusion, that whenever it appears that the agreement was intended by the partners themselves as one of *agency* or *service*, but the agent or servant is to be remunerated by a *portion of the profits*, then the contract would be considered, as between themselves, one of *agency* (*Geddes v. Wallace*, 2 Bligh, 270.; *R. v. Hartley*, Russ. & R. 139.); but as between them and third persons, one of *partnership*, (*Smith v. Watson*, 2 B. & C. 407.; *Ex parte Rowlandson*, 1 Rose, 91.; *Green v. Beasley*, 2 Bing. N. C. 110.; *Ex parte Langdale*, 18 Ves. 300.). But, that, if the agent

contract of partnership that each of the contracting parties should have, in all events, a share of the partnership profits: it is sufficient that he *may probably* have a share, which may be made to depend conditionally on the amount of the partnership profits. This is to be found in that case of Law 44. ff. *Pro Socio*. (Dig. lib. xvii. tit. 2. l. 44.): *Si Margarita tibi vendenda dedero, ut si ea decem vendidisses, redderes mihi decem; si pluris, quod excedit tu haberes: mihi videtur, si animo contrahendæ societatis id actum sit, pro socio esse actionem*.

In that case, the tradesman with whom I have contracted partnership for the sale of my jewels, to which partnership he brings his labour and industry in order to sell them, would not have any share in the profits of the sale, which is the object of the partnership, save in one event, viz., if the jewels be sold for more than ten thousand livres; and that share is regulated in proportion as they shall be sold above ten thousand livres. If they are only sold for ten thousand livres, he will have no part of the price, and he will have lost the labour he

or servant is to be remunerated, not by a portion of the profits, but by part of a *gross fund or stock which is not altogether composed of the profits*, the contract, even as against third persons, will be one of *agency*, although that fund or stock may include the profits, so that its value, and the *quantum* of the agent's reward, will necessarily fluctuate with their fluctuation (1 Smith's Leading Cases, 507.); and, it seems, that where the agent or servant is not to receive a part of the profits *in specie*; but a sum of money calculated in proportion to a given quantum of the profits, he will *not* be a partner even as to third persons. (*Ex parte Hamper*, 17 Ves. 404. 412.; *Ex parte Watson*, 19 Ves. 461., and see *Grace v. Smith*, 2 W. Black. 998.; *Pott v. Eyton*, 3 C. B. 32.; *Barry v. Nesham*, 3 C. B. 641.; *Withington v. Herring*, 3 M. & P. 30.; *Stocker v. Brockelbank*, 3 Mac. & Gord. 250.). The option to become a partner and receive a share of the profits, even from a time past, is not of itself alone, and while it remains unexercised, sufficient to make him a partner. *Gabriel v. Evill*, 9 Mee. & W. 297., Car. & M. 358.; *Ex parte Turquand*, 2 M. D. & D. 340.; *Wilson v. Whitehead*, 10 Mee. & W. 503.

A person receiving interest or an annuity, fixed as to amount and duration for money lent to a firm, is not a partner, because he has no mutuality in the profits with the firm (*Grace v. Smith*, 2 Sir W. Black. 998.); but if he received an annuity out of (*Bond v. Pittard*, 3 M. & W. 357. 361.; *Ex parte Wheeler*, Buck. 25.; *Ex parte Chuck*, 8 Bingh. 469.; *Ex parte Hamper*, 17 Ves. 404. 412.) or in lieu of the profits of a trade, or determinable on the cessation of the trade (*Bloxam v. Pell*, 2 W. Bl. 999.), or an annuity (*Young v. Axtell*, cited 2 H. Bl. 242.; *Ex parte Wheeler*, Buck. 25.), or rate of interest (*Ex parte Chuck*, 8

has been at to sell them. In the contract of partnership, then, there may be withheld from one of the partners, not in all events, but only in a certain event, a share in the profits resulting from the partnership, and that share may be made to depend, as in the case quoted, on the amount to which the profits may reach.

Observe, with regard to the *natural equity* of this agreement, it is necessary that the value of the labour which the tradesman brings to the partnership, and which he runs the risk of losing if the jewels are not sold for more than ten thousand livres, should be equivalent to the value of the expectation of their being sold at a greater price.

Observe, also, that in order that the agreement, by which I have agreed to give to the person whom I have commissioned to sell my jewels whatever they may be sold for above ten thousand livres, should comprehend a contract of partnership, it is necessary that such person should be a tradesman or a jeweller to whom I relinquish that part of the price in consideration of his industry and care, which he is to contribute in order to procure an advantageous sale for my jewels. But if that person is neither a tradesman nor a jeweller, and it was in order to confer a gratuity upon him that I promised a share in the price of my jewels, which I could sell as advantageously myself, in such case the agreement amounts to a donation, and not a contract of partnership; because that person is not to receive a share of the proceeds of the sale, on account of the labour and industry which he contributes to the business of that sale, but as a gratuity. Therefore the jurisconsult, in the law above cited, leaves for examina-

Bing. 469.), although it be contingent (*Ex parte* Wilson, Buck. 48.), fluctuating with the rate of the profits, he will be considered as a partner. See Coll. Part. 26—29. ; Stor. Part. 98.

The reason given why in these cases, when it is held there is a community of profits, the person receiving a salary, an annuity, or interest, is considered as a partner, is, that by taking a part of the profits he takes from the creditors a part of the fund which is their proper security for payment to them of their debts. *Waugh v. Carver*, 2 H. Black. 235. ; *Barry v. Nesham*, 16 L. J. C. P. 21., and it is upon this ground that a *dormant* partner, that is to say, one who without being known to third parties as a partner receives a share of the profits of a firm, is liable for its engagements. *Robinson v. Wilkinson*, 3 Price 538. ; *Winter v. Crowther*, 1 Cr. & Jer. 316.

tion what has been the intention of the parties in that agreement, *si animo contrahendæ societatis id actum sit*.

14. Fourthly: it is necessary to the validity of a contract of partnership that the business which is its object, and for which the contracting parties associate themselves, should be lawful, and that the profit which they propose to draw therefrom should be a lawful profit.

Therefore, an agreement by which persons enter into a partnership to carry on smuggling is null and void; as well as that by which persons enter into partnership in order to carry on usury, or to keep a house of ill fame (*mauvais lieu*), or to rob; *nec enim ulla societas malificiorum*; l. i. § 14., *De Tut. et Rat. Distr.* (Dig. lib. xxvii. tit. 3. l. i. 1. § 14.) *nec, societas aut mandatum flagitiosæ rei ulla vires habet*; l. xxxv. § 2. ff. *De Contr. Empt.* (Dig. lib. xviii. tit. 1. l. 35. § 2.)

§ IV. *What natural Equity requires in the Contract of Partnership.*

FIRST RULE.

In order that the contract of partnership may be equitable, it is generally necessary that the share assigned by it to

¹⁴ Civ. Code of France, 1833. *arté*, l. Code of Louisiana, art. 2775. Our law is the same upon this subject, and is now settled that a partnership not only entered into for immoral purposes such as are *mala in se*, but also for purposes such as are not bad in themselves but prohibited by the laws of the country, is void. The consequence is, that with regard to transactions arising out of such partnerships, no proceedings can be taken by the parties, either against each other or third parties; for, although, as observed by Lord Mansfield, "the objection that a contract is immoral or illegal, sounds, at all times, very ill in the mouth of a defendant, it is not for his sake that the objection is ever allowed; but it is founded in general principles of Policy, which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff. The principle being, *ex dolo malo non oritur actio*." Cowp. Rep. 343. It has, however, been held, that a partner who has possessed himself of the property of the firm, cannot retain it by merely showing that in realising it some provision of an Act of Parliament has been violated or neglected, and the Court will not refuse to interfere between importers of any article of commerce merely on proof that in its production or exportation some fiscal law of the country of produce has been violated. *Sharp v. Taylor*, 2 Ph. 841. Partners will be liable to third parties, who may contract with them without a knowledge of the illegal or immoral object of the partnership. *Aubert v. Maze*, 2 Boss. & Pull. 371.

each of the partners in the anticipated profits should be in proportion to the value of what each of them has brought into the partnership.

15. For example, if two partners have contributed equally to the capital of the partnership, they ought each to have an equal share in the profits. But if one of them has brought in double what the other has, he ought to have a double share of the profits; that is to say, he ought to have two thirds and the other only one third.

In order then to regulate the shares which each ought to have in the profits of a partnership, a value should be put upon what each brings into it. If a false valuation has been made, and there has been allotted to one of them a smaller and to another a larger share than he ought to have, the contract of partnership is inequitable. For example: if I have contracted a partnership with you in which what we have each contributed is of the value of five thousand livres, and yet, by an incorrect valuation, my contribution has been estimated only at four thousand livres, and, on the contrary, yours has been valued at six thousand livres; — if, in consequence, there has been assigned to you three fifths of the capital and profits of the partnership, and to me only two fifths, the contract of partnership is inequitable. If you are aware of it, either at the time of the contract, or since, you are under an obligation *in foro conscientie* to make up to me the moiety which I ought to have had in the division of the capital and the profits of the partnership, if a correct valuation had been made.

In the exterior forum; that is to say, in strict law, the parties cannot be heard, in such a case, to complain of the inequity of the contract, according to the principles established in my “Treatise on Obligations.” (n. 34.)¹

16. When a trader enters into partnership with an artisan, to which the latter brings only his labour, which I will suppose worth a hundred crowns, and the trader brings a sum of one thousand crowns — whether in ready money or stock-in-

¹ See vol. i. p. 21. of the Translation of the “Treatise on Obligations,” by the late Sir W. D. Evans.

trade on the terms of withdrawing it at the distribution (*au partage*) of the effects of partnership, which is to last for a year; in that case, in computing what each has brought into the partnership, and, consequently, in fixing what share each of the partners should have in the profits, we ought not to say that the artisan has contributed the sum of one hundred crowns, at which his labour is estimated, and the trader, one thousand crowns, and that, consequently, the trader should have for his share ten-elevenths, and the artisan one-eleventh only; for the trader does not bring the sum of one thousand crowns into the partnership; he only brings in the use thereof for the year during which the partnership is to last, and then he may withdraw it. We ought not, then, to reckon that the trader has brought anything into the partnership, save the value of the use of that sum, which *Puffendorf* believes ought to be estimated at the ordinary interest of money. According to this principle, in the case supposed, the trader will be considered to have brought into the partnership the sum of one hundred and fifty livres; and he ought, consequently, only to have a third part of the profits.

It would be different if the trader had not reserved the right of withdrawing that sum. For in such case, as he would bring into the partnership the sum itself, and not merely the use of it, it is clear that he ought, in the case proposed, to have ten-elevenths, as well of the capital as of the profits of the partnership, and the artisan only one-eleventh.

17. The principle which we have established, that the contract of partnership is inequitable, when the share which each of the partners is to have in the profits of the partnership is not in proportion to what they have brought into it, is subject to two exceptions.

The first is, when one of the partners, knowing at the time of the contract that the other brings less than himself into the partnership, is willing, nevertheless, in order to make a gratuity, to admit him to an equal share therein. In such case, it cannot be said that there is a want of equity in the contract: because *volenti non fit injuria*: but the contract is not, in that case, purely and entirely a contract of partnership; it is partly a donation. Nevertheless, it is not the less

valid. It is true, that if the contract was only made in order to confer a gratuity upon one of the contracting parties, who had contributed nothing, it would not be a contract of partnership: and it is in that sense that *Ulpian* says: *Donationis causâ societas non rectè contrahitur*; l. 5. s. 2. ff. *Pro Soc.* (Dig. lib. xvii. tit. 2. l. 5. § 2.)

But although a person may, by the contract, in some particular, have conferred a gratuity upon one of the parties, nevertheless, it does not cease to be a true partnership contract, and will be valid, provided the partner to whom I have given an advantage is not a person to whom the law forbids me to make a gift; in the same manner as a contract of sale, which would not be a true contract of sale, if there were no (*prix sérieux*) valuable consideration for it, does not cease to be a true contract of sale, although the seller, in order to confer a gratuity upon the purchaser, sells at a price below the real value, provided that such purchaser is not a person to whom it is forbidden to make a gift.¹ L. 38. ff. *De Contr. Empt.* Dig. lib. xviii. tit. 1. l. 38.

18. The second exception is, that there may be assigned by the contract to one of the partners a greater share in the profits than what he has contributed to the partnership, without the contract containing, on that account, anything inequitable, or even any gratuity, when that partner compensates for the advantage by an equivalent which he, on his part, has conferred upon the other partner.

The following case may be given as an example. Two coopers enter into partnership together for the manufacturing and sale of casks; each of them contributing to the partnership his labour, and half the capital of which it is to be composed. One of them, depending upon his ability as a judge of wood, after having examined what they are about to employ, takes upon himself, by the contract of partnership, the sole charge of the warranty (*du vice de fût*) against defects in the casks, for which coopers are liable, to those who purchase their casks; and they agree, that in conse-

¹ See Pothier's "Treatise on the Contract of Sale," n. 21., translated by L. S. Cushing. Little and Brown, Boston, U. S. 1839.

quence of his having charged himself alone with that warranty, and of his having bound himself to indemnify the partnership therefrom, he shall have three-fourths of the profits, if there are any: and that, nevertheless, in case of loss, he shall only bear a moiety.

This agreement is valid; for such part of the profits, which is assigned to him, over and above the moiety, is a recompense for the benefit which he has conferred upon his partner by discharging him from the risk of the warranty, to a moiety of which he would have been liable. It is the price of the moiety of the risk from which he discharges him. An infinity of other examples may be imagined.

SECOND RULE.

Generally, each of the partners ought to bear the same proportion of the losses of the partnership, as he ought to have of its profits, in case it is prosperous.

19. There is an exception to this rule in the case, where one of the partners, to whom there has been assigned a share in the profits in proportion only to what he has contributed to the partnership in money or stock-in-trade, has also brought to it his skill and industry. It might, in that case, be equitably agreed that he shall bear a smaller, or even no share of the loss, provided the value of his skill and industry be equal to the risk of the loss from which he is discharged. *Ita cūiri societatem posse, ut nullius partem damni alter sentiat, lucrum verò commune sit Cassius scribit; quod ita demum valebit, si tanti sit opera, quanti damnum est.* L. 29. § 1. ff. *Pro. Soc.* (Dig. lib. xvii. tit. 2.; l. 29. § 1.)

20. In general, whenever one of the partners (*en son particulier*) personally brings any advantage to the partnership, in order to recompense him, it may be agreed that he shall

¹⁰ A stipulation that one of the partners shall not be liable to loss, is in our law valid, as between the parties themselves (*Fereday v. Hordern*, Jac. 144.; *Gilpin v. Enderby*, 5 B. & A. 954.; *Bond v. Pittard*, 3 M. & W. 357.); unless it were intended as a mere disguise of usury (*Jestons v. Brooke*, Cowp. 793.; *Morse v. Wilson*, 4 T. R. 353.); but it will not render him less liable to third parties. *Waugh v. Carver*, 2 H. Bl. 235.; 1 Smith's Lead. Cas. 491.; *Fereday v. Hordern*, Jac. 147.

be discharged, either partially or entirely, from the loss which the partnership may sustain. For example, if, in the cooperage trade, one of the partners charges himself alone with the warranty (*du vice de fût*) against defects of the casks, and binds himself to indemnify the partnership therefrom, in order to recompense him for the advantage which he has conferred upon the partnership, it may be agreed, although he is a partner as to one-half, and is to receive one-half of the profits, if there are any, that nevertheless, in case of loss, he shall bear only a smaller share, — for instance, one-third or one-fourth only.

This agreement is equitable, if the share of the risk of loss from which he is discharged, is equivalent in value to the share of the risk of the warranty from which he has discharged his partner.

21. What has been said, that it may be agreed, without acting inequitably, that one of the partners shall bear a smaller, or even not bear any, share in the losses, ought not to be understood in this sense, that such partner shall have a share in the profit of every transaction which shall have been advantageous to the partnership, without sustaining any of the losses that the partnership has incurred in those which have been disadvantageous, for that would be manifestly unjust: but it is to be understood in this sense, that after the dissolution of the partnership, an account shall be taken of all the gains that the partnership has made, and an account of all the losses that it has incurred in all the different transactions in which it has been engaged; and that if the total of the profits exceeds the total of the losses, that partner shall take his share of the surplus; and that if, on the contrary, the total of the losses exceeds that of the profits, he shall have neither profit nor loss: *Neque enim lucrum intelligitur, nisi omni damno deducto; neque damnum, nisi omni lucro deducto*; L. 30. ff. *Pro Soc.* (Dig. lib. xvii. tit. 2. l. 30.)

²¹ A stipulation which would set free from all contributions to losses, sums or effects put into the capital of the partnership by one or more of the partners, is void. Civ. Code of France, art. 1855. See *Bond v. Pittard*, 3 Mees. & Wels. 357. 359, 360.; *Gilpin v. Enderby*, 5 Barn. & Ald. 954.; *Fereday v. Hornern*, Jac. 144.

§ V. Of fictitious Contracts of Partnership.

22. When it appears that a contract of partnership is fictitious, and that it has only been entered into for the purpose of disguising a usurious loan of money, it is clear that the contract ought to be declared void, and that whatever has been received by the pretended partner, in the place of his share in the profits of the pretended partnership, ought to be (*imputè sur*) reckoned against the principal sum which he has put therein, and that the sum which he has received diminishes (*de plein droit*) of full right that which ought to be restored to him.

²² So according to our law, a pretended contract of partnership entered into with the mere intention of obtaining a usurious interest for a loan of money, will be null and void, as "there is no contrivance whatever," to use the words of Lord Mansfield, "by which a man can cover usury." See *Jestons v. Brooke*, Cowp. 793.; *Morse v. Wilson*, 4 T. R. 353.; Coll. Partn. 38.

It must, however, be remembered now that bills of exchange, and loans, of money above 10*l.* not being upon the security of lands, tenements, or hereditaments, or any estate or interest therein, are not affected by the usury laws: see 2 & 3 Vict., c.37., continued by 8 & 9 Vict. c. 102., and by subsequent enactments. However, even previous to the passing of these Acts, although the return of the capital and profits beyond the legal rate of interest might have been secured to one of the parties, if the contract of partnership did not appear to be fictitious, or to have been used as a mere shift to cover usury, it would be valid, because the principal advanced, would, although secured at all events to be repaid by the other partner, *be hazarded by* being liable to the demands of third parties. Thus, in *Gilpin v. Enderby*, 1 D. & R. 570., 5 B. & Ald. 954. Enderby being established in trade and wishing to increase his capital, entered into a contract of partnership for ten years with Gilpin, who advanced 20,000*l.*, upon a covenant that he should receive 2000*l.* per annum, during the partnership, out of the profits, if there were any, and if none, out of the capital; that he should not be answerable for any losses or expenses incident to the concern, and that the business should be carried on in the name of Enderby only; that at the end of the ten years, if the partnership determined by efflux of time, he should be repaid the 20,000*l.* by instalments at three months' date bearing legal interest; and that if default was made in the annual payment of 2000*l.*, or the joint capital was at any time reduced to 20,000*l.*, then he should be at liberty to terminate the partnership and repay himself the 20,000*l.* advanced, immediately. Gilpin brought an action of covenant and recovered damages for the nonpayment of the 20,000*l.* at the end of ten years, the jury expressly negating usury; upon a writ of error it was held, affirming the judgment, that upon the face of the deed, Enderby and Gilpin were partners, and that there was no loan of money within the meaning of the statute of usury. The law upon the subject is well stated by

This ought to be sufficient to determine the question of the legality of a celebrated agreement¹ supposed, by the casuists, which contains three contracts.

First. A contract of partnership which I enter into with a merchant, who, having already capital, suppose thirty thousand livres, takes me into partnership for a fourth of his business, (*à raison*) in consideration of a sum of ten thousand livres which I bring into the partnership.

Secondly. A contract of assurance, by which the same merchant guarantees me my capital of ten thousand livres, which I put into the partnership, and which he binds himself to restore to me on its termination, upon condition that on my part I yield to him a certain portion of the profits I have a reason to expect for my share in the partnership; for example, if I expect that my share in the partnership will produce yearly a profit of about twelve per cent., more or less, I give up to him half of it.

Moreover, a third contract, by which I sell to the same merchant my capital in the partnership thus guaranteed, and all the gains I expect from it (*moyennant le prix*), in con-

Lord Tenterden, C. J., in his judgment. "By the execution of the deed," said his Lordship, "Enderby undoubtedly made himself liable as a partner to all the partnership creditors, though he might not be liable as between Gilpin and himself; and if the deed discloses the real facts, and the real intentions of the parties to it, this is not a case of a loan of money from Enderby to Gilpin, but a contract of partnership between them, of a peculiar kind certainly. If the deed does not disclose the real facts and intentions of the parties, but was executed only as a contrivance to cover a loan of 20,000*l.* for ten years, at 10*l.* per cent. interest, then undoubtedly it is void. This is a fact, however, which ought to have been found as such affirmatively by the jury, in order to have enabled the Court to pronounce an opinion thereupon. But as such fact has not been found, and in the absence of such finding we must consider the deed as speaking the real language of the parties, and so considering it, we cannot pronounce it void. The partnership as constituted by this deed, may be probably of an unusual kind, but that circumstance will not authorise us to say that there was no partnership, and that this was simply a loan of money." See also *Morisset v. King*, 2 Burr. 891.; *Fereday v. Hordern*, Jac. 144., and see *Armstrong v. Lewis*, 2 Crompt. & M. 274.; see, however, *Brophy v. Holmes*, 2 Moll. 1.

¹ It must be borne in mind that, at the time when Pothier wrote, all loans of money at interest were held to be *usurious*, partly because money was considered to be in itself an unproductive commodity, but principally because ecclesiastics thought that the lending of money at interest was forbidden by Holy Writ. See also 1 Domat. book 1. tit. 6.

sideration of a sum of ten thousand livres, which he binds himself to pay to me at the termination of the partnership, with five hundred livres for interest yearly until the time of repayment. *Diana*¹, after having supposed this agreement, proposes the question, whether it be lawful. He decides in the affirmative. His reason is, that these three contracts, considered separately, being lawful, they cannot be the less so, although united by the same agreement. It is not necessary, for the purpose of refuting this decision of *Diana*, to accumulate all the authorities which the author of the "Conferences of Paris" has collected.

It needs no great acuteness to perceive that such agreement in truth is nothing else than a loan of ten thousand livres at interest made by me to that merchant, which ought, according to strict law (*dans le for exterieur*), as well as *in foro conscientiæ*, to be declared usurious; and, consequently, the interest ought to be reckoned against the principal. It is very clear, that the three pretended contracts, comprised in the agreement are only feigned in order to disguise a loan at interest, and that, in truth, I had no intention of entering into partnership with the merchant, but only of getting from him interest on the sum which I lent. And even if, by a misconception, I should have persuaded myself that I had really the intention of entering into three successive contracts with him, this would be an illusion produced by my cupidity, in order to disguise from myself the vice of usury in the loan at interest to which the whole of the agreement resolves itself.

In general, whenever a private person makes a pretended contract of partnership with a trader, who takes him as partner into his business for a certain sum of money, which he brings to that trader, who binds himself to restore it to him at the end of the partnership, without that person bearing any share of the loss, if the partnership does not succeed; and on the terms that he shall have a certain share of the gain, however moderate that share of the gain may be, in con-

¹ See Troplong's "Droit Civil expliqué Contrat de Société," vol. i. p. 61., who attributes the origin of this celebrated agreement to the Oriental clergy.

sequence of his not bearing any part of the loss, and whether that share is (*assurée*) guaranteed to amount to a certain sum yearly, or whether it be not so, such a contract ought to be considered a contract of a fictitious partnership, which has only been entered into to disguise a usurious loan which that private person wished to make to the trader of the sum of money which he had put in his hands. The trader who by this pretended contract of partnership does not discharge himself from any part of the risk of losses which may happen in his business, has no intention of entering into a contract of partnership; he has no other intention than that of borrowing the sum that such person puts in his hands; and the share that he gives him in the profits of the partnership is instead of the interest which that person requires for the loan. That person, in like manner, has no other intention than to draw an illegal profit from the loan of that sum of money, which it ought not to produce, by disguising the loan as a contract of partnership.

23. The decision will be otherwise in the case where a trader who has a good business, of which the capital is forty thousand livres, enters into a contract of partnership with a private person, who also brings in a capital of forty thousand livres, with a clause that such person should, in consideration of his taking upon himself all losses, have three-fourths of the profits, instead of the moiety which he ought only to have. This contract is a true contract of partnership. The clause by which the trader discharges himself from risk of loss, at the expense of his partner, is not at all inequitable, provided the expectation of gain being at least in double ratio to the risk of loss, the value of the expectation of the fourth of the profits, which the former gives up, is equivalent to the value of the risk of his moiety of the loss with which he charges his partner. The capital, which the trader has put into the partnership, being a productive thing, he can retain a part of the gain, although the other partner assures to him the capital, and frees him from the risk of loss.

24. If the private person, who has entered into a contract of partnership with a trader, to which he has brought a certain sum of money, in order to have a share as well in the capital

as in the profits or loss of the partnership, on account of that sum, — makes, at a time not liable to suspicion, after some years, an agreement with that trader, by which he sells to him his right in the partnership for the same sum which he brought into the partnership, which the trader binds himself to repay at the time fixed for its termination, with a certain interest yearly — is such an agreement which would not have been valid if it had been made at the time of the contract, and which would then have passed for a loan, at interest, disguised as a false contract of partnership, — is it binding, having been made at the end of several years? I think that it is valid, both *in foro conscientiae* and in strict law (*for extérieur*). It is valid *in foro conscientiae*, provided it be a new agreement, and that the contract of partnership were not made upon a secret compact, that the trader would purchase from such person his share of the partnership. It is equally binding in strict law (*for extérieur*), because the length of time which has elapsed between the contract of partnership and the agreement renders it impossible to suspect that such contract was not a true contract of partnership, or that it was made with that secret compact.

But there having been a true contract of partnership between the parties, the private person having, by such contract, acquired a share in the capital of the business, which constitutes the capital of the partnership, and the capital of the business being productive, he can sell to his co-partner his share in the capital of the business, and take interest for the price at which he has sold it.

25. The same decision must be given with respect to a contract of assurance, by which that private person, at the end of some years, causes what he brought into the partnership to be guaranteed to him by the trader his co-partner, who, undertakes to bear at his own cost all the loss which may happen to the partnership, if unsuccessful, in consideration of such person giving up to the trader a part of his share of the expected profits. This contract, as well as the former, is quite lawful, provided the value of the expected profits, which such person gives up to the trader, be equal to the value of the risk of loss with which he is charged.

Nevertheless, the author of the Conferences, vol. asserts that a person cannot legally make this co assurance with his co-partner, although he allows, p. he can, with a third party. He gives a very bad r this; viz., that such contract of assurance destroy opinion, the contract of partnership. This is inco we have seen above (n. 19.) a contract of partnership valid, although one of the partners is not to bear s of the loss (which is, indeed, an assurance of what brought thereto,) provided that he has given to his ners, who have charged themselves with the risk of l he might incur therefrom, an equivalent to the price risk.

26. The author of the Conferences, in the same where he condemns the contract of assurance by which the partners causes what he has brought into the ship to be guaranteed by another partner, condemns another agreement, by which one of the partners, causing what he has brought into the partnership to be guaranteed, and remaining subject to loss as to his share, if the partnership be unsuccessful, sells his share in the profits for a certain sum. I see nothing wrong in this agreement. The expectation of profits from a partnership is as preciable, as is the haul or take of a net; and I can frequently sell it, either to my partner or to a third party in the same manner as one may sell the take of a net.

The reasons of the author of the Conferences are according to his opinion, the contract of sale, which I enter into with my partner, of the uncertain profits which I expect from the partnership, "is contrary to the equality which ought to be found in partnerships." He should have said, "is contrary to the equality of the contracts;" for here the question is not about a contract of partnership. The contract now in question, although it has been entered into between partners, is not a partnership contract. It is a contract of sale that I enter into with my partner, as I could with any other person, of my share of the expected profits of the partnership. Nevertheless, I agree that equality should be found in this contract, and it is to be found there; because the share which I have

uncertain expectation of the profits of the partnership being something appreciable, it suffices, in order that equality should be found in the contract, that what is given to me thereby for the price of the expectancy which I sell, should be the just price of that expectancy.

The author of the Conferences adds : — “ That a contract of sale assures a certain profit to one partner ; but between partners there ought not to be any certain profit, everything ought to be uncertain, as well the capital as the profits.” If the author means, by this, that the share of the uncertain expectation of profits cannot be given up in consideration of a certain sum, it is to assume precisely the point in question ; that is, only a *petitio principii* and bad reasoning.

27. If the person who has brought to a trader a sum of money, in order to be in partnership with him in his business, had made these contracts of sale or assurance of his share shortly after the contract of partnership, there would have been grounds for the presumption that they were only in execution of a secret compact added to the contract of partnership ; and, consequently, in strict law (*for extérieur*), these contracts, as well as the contract of partnership, ought to be declared void and fictitious, as being entered into for the purpose only of disguising a usurious loan of the sum of money brought by such person to the trader.

ART. IV. — TUSCAN JURISPRUDENCE. — CASE OF THE MADIAI.¹

Florence, December 28, 1852.

MY DEAR SIR, — You know that I have been a *détenue* at Florence, although neither imprisoned by the Government, or cut down by the Austrians. Part of my enforced leisure from the duties of an industrious tourist I have

¹ Letters to James Stewart, Esq., Treasurer to the Society for the Amendment of the Law ; on the present State of the Criminal Law in Tuscany, its Prospects and its Administration. With Remarks on the Cases of Count Guicciardini and the two Madiai. Letter I.

ing some acquaintance with the state and
law in Tuscany, and its administration;
ed to these inquiries by my desire fully
ral merits of the astounding sentence of
o ascertain how it was possible to bring
the code of Peter Leopold, on which
y founded. Nor is the interest which
v lawyer, must take in such a case
he contrary much increased, by my
with the extraordinary merits of
which has been brought to light
has disclosed some trait honour-
it had been the object of those
s to make an odious principle
mstances of its application,
tely attained.

elf bore ample testimony to
expressed his regret that
v and beneficence should
! here, at the outset, I
whole conflict in Court
tterness of expression,
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re so familiar in the
! judges. Nothing
v on our parts to
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although as regards the poor Madiai I very much fear that it will be useless.

The truth is, and it is a truth which must strike the mind of every traveller on the Continent, that the tone of the *parti prêtre* has been raised all over Europe by the results of the revolutionary struggle of 1848, and that a most vigorous attempt is making towards a general restoration of the authority of the Church of Rome over the consciences of mankind.

Again the Church invokes the aid of the secular arm, and thoroughly conscious both of her strength and her weakness, she is casting off the mask of toleration, and putting her hope in the myriads of bayonets which the accidents of the time have brought to her aid.

It has so happened that Florence has become the battlefield in the war between mind and matter, and it seems to be felt that to suffer the Madiai to be carried off would be the signal of defeat.

The foundation of the Tuscan system of Criminal Law, as it now stands, and indeed much of its superstructure, is, as you well know, the work of Leopold the First, the Great Peter Leopold, as he is, despite many failings, most justly called. And yet this noble work formed only one of his claims to the gratitude of posterity. He went far to accomplish for Tuscany the object which, when it is obtained for England, will owe so much to your own untiring labours; — I mean the liberation of the landowners from the shackles which prevent them from turning their property to the best advantage both for themselves and for the public. Nor was even this victory more than a portion of his magnificent conquest over all the principles of restraint — so called protection — which then prevailed in every commercial code. He abrogated all the laws which interfered with the free import and export of agricultural produce; and although for many years he had to struggle against the prejudices even of the class most benefited by the change, and although he died before the truth of his doctrines was fully admitted, yet “unrestricted competition” has now become in Tuscany, as I have been informed by more than one enlightened Floren-

tine, a species of "terrestrial religion" which must be respected by every Government, however despotic.

With all these claims on the gratitude of the Tuscans, claims which are admitted in the strongest terms by all their writers, I was disagreeably surprised to find that no good life of their benefactor is to be found in their libraries. The History of Tuscany, from the failure of the Medicean line in 1737 to the year 1814, by Zobi¹, supplies the want in some degree: perhaps I ought to say in some considerable degree, but it leaves much to be desired in matters of detail, especially by the foreign reader.

Perhaps it would not be quite reasonable to expect the Italians to write exactly such a work as would be adapted for England; which, to be clear and interesting to us, must enter into explanations needless and therefore wearisome to the natives. If you were not so well and so fully employed, I would recommend the work to you. Had Roscoe undertaken it, his knowledge of law and political economy, together with his rare diligence, would have admirably fitted him for the task; and I cannot but think that England would in all probability have been much sooner converted to her present opinions if it had been performed. Millions might have been saved, and many a hungry belly would have been filled, to say nothing of the infinite quantity of nonsense which our eyes would have been spared from reading and our ears from hearing; and if by this application of his talents we had lost his *Lives of Lorenzo di Medici and Leo the Tenth*, the Italian successors of Roscoe have convinced us, me at least, that our misfortune might have been endurable.

While I am writing, the "*Spectator*"² is brought to me;—be it known that the Post Office of Tuscany brings us all the English newspapers with absolute impartiality. In the "*Spectator*" I find a review of the supplementary volume of Niebuhr's *Life and Letters*, which work contains a censure on Peter Leopold, made on the high authority of the Chevalier Bunsen. The charge is, that "Peter Leopold, the liberal Grand Duke of Tuscany, swept away, for the love of state

¹ When finished, this work will extend to the year 1848.

² Of December 11. 1852.

uniformity, the last remnant of the municipal independence of Tuscany." Probably the Chevalier has not seen the work of Zobi. If he had, he would have found that the municipal bodies had long before lost their power of self-government in point of fact; the local authorities having been disabled (though not suppressed) under the reign of the Medici; and that Peter Leopold not merely re-adjusted the municipal districts (in itself a great benefit), but restored to the municipalities their *autonomy*. The complication and conflict of offices and duties which pervaded the whole state in 1737, when Tuscany passed from the rule of the Medici to that of the Lorenzo-Austrian dynasty, was of itself a heavy burden on the people, and impeded in a thousand ways its freedom of action.

The early Medici were princes, as Gibbon calls them, "without arms and without a title." It was their policy to stand behind the scenes and work the puppets. To a great extent their policy was imitated by their successors after they had mounted the throne; and hence the policy to which I have adverted. Nothing was destroyed, at least, so far as forms went, so that the whole state became a system of costly shams.

It was the policy of Augustus, refined by even greater cunning though informed by less wisdom; and I am disposed to think, *pace tantorum virorum* as Niebuhr and Bunsen, that a government which hides itself and acts through the necessary complexity of a puppet machinery, combines within itself all the evils incident to every other form of polity. It has the costly checks and safeguards of liberty, without the thing itself. It is a despotism, hampered, and consequently without that freedom and simplicity of movement which not unfrequently endow it with many apparent and some real advantages over popular institutions.

It has sometimes occurred to me that tyrannies, muffled after this fashion, resemble in their operation on their unhappy subjects our usury laws, under which the borrower had not only to pay the usurer as much as he would have charged if left to himself, but an additional sum for evading the cumbrous but useless protection which the cruel kindness

of the Legislature cast about the unhappy customer. For my part, I cannot but think that if Peter Leopold had enjoyed all the general experience to which we can now point, as having proved the difficulty of making any people really free and really self-acting, and if he could have added such knowledge to that with which bitter personal experience had made him but too familiar (I mean the difficulty even of the highest and most obvious value, upon a nation whose opinions have not received the enlargement and the discipline which result from the play of popular institutions), he could not have taken a better course than commencing with the establishment of free municipalities. They are the *primordia rerum* in political affairs; and, although this is not the most favourable moment for citing the example, yet I do with confidence look forward to the municipalities, even of Imperial France if permitted to remain, as to a sure hope of ultimate emancipation.

Doubtless, Peter Leopold had his faults; some were of the age, and some were of the man. Despite his free municipalities and his promised constitution, — a promise which I see no reason to doubt was sincere, and would have been fulfilled but for the French Revolution, — he was rather too much of a king after the model of Telemaque, too fond of setting himself up as a human Providence; and most severely was he punished for his presumption. Among the most unjustifiable interferences with the predilections of his people, must be numbered his prohibition to cover the images of the Virgin and of Saints with the veil, pallium, &c. at the festivals and processions of the Church.

No doubt, the Grand Duke desired to accomplish the excellent object of weaning his people from superstition. The end was good, but what could be more absurd and unjustifiable than the means?

He interfered, too, by a kind of sumptuary law, with funerals — all this gave natural and, as I think, very just offence.

The consequences are instructive. No sooner had Peter Leopold, who in the year 1790 succeeded to the empire of Austria, departed from Tuscany, than the people in various

parts of the Duchy rose in tumult to reclothe the images, and to restore funeral obsequies to their former state; and as one commotion readily brings on another, demagogues, taking advantage of the inflamed state of the public mind, were able to raise a cry against the freedom of commerce in the cereal grains, although for many years they had been enjoying solid and incontrovertible benefits from the absence of corn laws!

Another change made by the Grand Duke evinced a very different knowledge of men and things. It was thought by the government, at a time of great public distress, advisable to check the habit of display in dress and ornament which prevailed, and a sumptuary law was suggested. The proposal, however, was very wisely rejected, all such laws having been shown by experience incapable of enforcement. The measure adopted was to address the members of the highest class, by a circular epistle, inviting them to set an example of frugality, and to make the court the theatre for exhibiting this reformation. The courtiers yielded to the intimation, and the example soon spread downwards from class to class until it was universally adopted, with one single, and somewhat curious, exception. The aspirants to the honour of the veil, who were about to enter the cloister, and to renounce for ever all the vanities of personal adornment, refused to anticipate the moment by adopting the new fashion, until after a special exhortation of the government, directed not so much to them as to their friends and relatives, on whom the expense of their inconsistent display must fall.

Peter Leopold is best known, however, in England by his Criminal Code. The public mind was ready for that reform, or, at least, better prepared than for a sound commercial code. The celebrated work of Beccaria, the labours of Howard, and the opinions of the respected Blackstone, had paved the way for the favourable reception of Peter Leopold's change. When I speak of a favourable reception, however, I must confine myself to those among us who gave their minds to a philosophical consideration of criminal jurisprudence; a distinction which, I am sorry to say, excludes

almost all the lawyers of that period, and perhaps quite all the Legislature. Let us be thankful that lawyers and legislators are not exactly in the same state in 1853 as they were in 1786.

The Leopoldine Code was the first practical fruit of the labours of the great Italian jurist. It is highly to the credit of the Austrian government, that the Empress Maria Theresa not only established a chair at Milan for the express purpose of giving Beccaria an opportunity of diffusing his doctrines, but consented, by decree, that the Austrian Professor Sonnenfels should in his lectures indoctrinate his pupils with those principles of Jurisprudence which he thought most just and reasonable, without any consideration as to how far they were in harmony or conflict with those of the existing law; although, to be sure, it grievously diminishes our admiration of such liberality to find that by a subsequent decree, she prohibited him from censuring judicial torture and capital punishment.¹

The blow, however, was struck — judicial torture was mortally wounded, and it requires no spirit of prophecy to be able to predict with safety that capital punishment will sooner or later meet a similar fate.

The Leopoldine Code does not shine as a work of art. Its merit consists in its recognition of great and humane principles.

The then existing law of Tuscany, like that of the Continent in general, well deserved the description of it contained in the preamble, as too severe, and derived from maxims established in the least happy periods of the Roman Empire. According to these maxims a prisoner was regarded under one or other of two aspects. If it were a political case, jurisprudence was looked upon merely as the machinery for putting him to death under the forms of law, and to this end both the definition of the crime, and the rules and maxims which regulated his trial, were carefully adapted. The definition was always loose, and almost always figurative, by way of rendering it easy to the Judge to bring any given

¹ "Supplica Apologetica di Sonnenfels à S. M. R. I. Maria Theresa. Dei Delittie delle Pene." Tomo iii. Firenze, 1821.

act distasteful to the reigning powers within the perils of the law. Hence the phrase "*Læsa Majestas*"—for as no one could say with any exactitude what *Majestas* was, so again it was not very easy to say how it was, or was not, to be wounded; and thus by virtue of this double vagueness, the judges obtained a pretty absolute power over every subject who had offended his prince. In the 62nd article of his code Peter Leopold struck at the root of this crying injustice. After reciting that the "multiplied offences comprised under the head of *Læsa Majestas* formed an abuse growing for the most part out of the despotism of the Roman Empire, and was not to be tolerated in any well-regulated society," he proceeds to expunge the whole class from his laws, leaving all such treasonable acts as would fall under any other head of crime, as robbery, murder, &c., to be punished as such crimes "without considering the offence as made heavier under any pretext of *Læsa Majestas*." At the same time he abolished an abuse which you will recollect is denounced with fitting severity by Beccaria, namely, the rule by which in proportion to the atrocity of the crime charged against the prisoner was the relaxation of strictness in the proof required for conviction—a rule the precise opposite of the maxim which prevails in our own law, and which is demanded by common sense and common justice. He thus abolishes the use of *privileged* evidence as it was called, "seeing that as the truth respecting all crimes must be established by the same means, if these privileged proofs are insufficient to establish the truth in one case they cannot have the requisite force in any other."

The second aspect in which the accused was regarded was as a species of game, or beast of chase, to be hunted according to certain fantastic rules and formalities, so that his destruction or escape had no very close connection with *his* guilt or his innocence. Such and such facts formed an *indicium* of proof, and it was dealing with these *indicia*, according to certain technical rules, that guilt was imputed or not imputed to the accused. It might therefore happen that the Judges were under legal compulsion to convict a prisoner whom they did not in their consciences believe to

be guilty, if the case made on the part of the prosecution furnished the technical requisites of demonstrative proof. The most glaring and revolting absurdity, however, in the whole procedure was the use of judicial torture, which Peter Leopold had abolished at an earlier period of his reign, but which he solemnly stigmatised and for ever banished from Tuscan Jurisprudence by the provisions of his Code.

Leopold, however, stopped short of open trial; which we consider (and, I have no doubt, rightly consider) as a safeguard to innocence and a check upon undue severity of greater practical importance than all other possible protections. This boon was enjoyed under the rule of the French, from 1808 to 1814, and was partially continued until the year 1838, when, with many other valuable amendments, it was made by the reigning Prince the general rule of the Tuscan Courts, very much to his own honour and to the advantage of his subjects. Still, open trial in Tuscany is not, so far as its effect on the public mind is concerned, what it is in England. The enormous length to which important trials run exhausts the patience of the audience. The hearers must necessarily change, if not every day, at least within some short period, and none but those whose official duty, or some special interest in the accused, keep in Court, can ever have more than a fragmentary knowledge of the case.

The trial of Guerrazzi, the revolutionary prime minister, has been in progress since the month of May, the Court sitting four days in each week, and it is expected not to conclude before the end of February. The accused is charged with *Læsa Majestas*, that class and denomination of offences having been, after the death of Peter Leopold, restored to the law. He, however, himself departed to a great extent from his own principles with respect to offences against the Government. But this was after the French Revolution, which, among other misfortunes attending it, not only stopped, but turned back, the course of gradual improvement, producing in the minds of some of the most ardent and sincere friends of humanity a disposition to reaction, for which it is more easy to find excuse than justification. It is, moreover, an open question as

to whether offences against the State, which, in our law, fall under the heads of Treason and Sedition, can be safely suffered to find their punishment under other heads of the Penal Code to which they may also belong, or be left in a state of impunity when not so provided for. I confess I should like to see the experiment tried. If treason and sedition could be altogether omitted, and the law of conspiracy better defined, as I think it might be, there would be no difficulty in clearing our criminal jurisprudence of all that is vague and figurative; and if the practical effect were little at home, because cases affected by it seldom arise, it would not be inconsiderable abroad, where the disposition to take England as a model is much greater than is willingly admitted. Still there can be no hesitation in stating that such a phrase as *Læsa Majestas* is discreditable to any body of laws in which it is found; and that our word Treason is not for a moment to be confounded with it.

Peter Leopold, although he did not re-establish the *Læsa Majestas*, did re-establish a law of treason far too vague in its terms not to deserve severe censure; and he also re-established the punishment of death for treasonable offences. This reaction had a most pernicious effect in shaking the faith of those whose minds had accepted the changes which he had wrought, and in augmenting the confidence of the very large class, who, like our own Eldons and Ellenboroughs, thought any relaxation in the severity of the laws, however ferocious, inconsistent with the well-being of society; and the change in the mind of Peter Leopold is triumphantly cited by the advocates of severity on every occasion of adding a harsh edict to the existing number. The legal history of Tuscany, from the departure of Leopold to the establishment of the Code Napoléon in 1808, when it had become part of the French empire, is a history of a gradual abandonment of Leopoldine principles, which were from time to time attacked with an almost insane antipathy. Taking it as a whole, the French Criminal Code, with its new course of procedure, was, notwithstanding its adoption of death-punishment, a great improvement even upon the jurisprudence of Peter Leopold. There was greater promptitude and simplicity in the pro-

ceedings, and the public were admitted for the first time into the Courts. The gravest defect, too, of the Leopoldine system, to which I have not yet adverted, was corrected in a very considerable degree. Leopold had made certain changes in what in Tuscany is called the Economic Police, which probably left matters much better than he found them; but his police was founded on principles utterly opposed to our views, and which, it cannot be denied, must be redolent of abuse.

The minister of police had a species of equitable jurisdiction in criminal matters not a little resembling in its *modus operandi*, the practice of our Courts of Chancery in early times, before the great seal was bound by the rules which have grown out of its own decisions. What the heads of the police-force thought injurious or inconvenient to the public or the Prince, they prevented, when prevention was possible, and punished if the act had been committed. Their punitive power was limited, but was yet considerable. They could imprison for a short period; and they could order the prisoner, convicted under their own *ex-post-facto* law, to be whipped. The preventive part of their jurisdiction they seem to have exercised by a species of criminal injunction, which they called a precept, or sometimes in a less formal manner, by verbal monition. This field of authority was very much narrowed by the Code Napoléon, though it can hardly be said to have been entirely closed; and when the fall of the Emperor brought back the Lorenzo-Austrian dynasty, it deprived Tuscany of the ameliorations in its criminal law which it owed to Napoleon, the restored government refusing to recognise the legislative acts of the Empire. But as the Code of Leopold had not passed away without leaving behind it, among the people at large, some appreciation of its excellences, so neither were the benefits of the Code of Napoleon altogether forgotten or unlamented; and it does not derogate from the merits of the reigning prince, to attribute in some degree the reform which he made in the year 1838 (following to some extent the model of the French Code) to the popular desire for such changes, which grew out of their experience to which I have referred. And this brings me to that year.

The changes of which I speak will be found in the Edicts contained in a work published by the Government, which bears the title of "Prontuario delle Sovrane Disposizioni, relative alla Riforma giudiziaria Toscana dell' Anno 1838." It would occupy too much time and space, to give even an outline of the Prontuario, which contains a new system of civil and criminal courts, and a new course of procedure. I will touch, however, upon such points as bear upon the case of the Madiai, on which, as I have already intimated, I propose to make some remarks.

The police having exercised their powers of arrest, search of the person of the prisoner and of his house, and perhaps of other houses, for books and papers, and having interrogated the prisoner, the next step is to ascertain under what category the act imputed to him falls; *i. e.* is it a matter to be disposed of by the police; or is it *leggiera offesa*? or, thirdly, is it a *delitto*? All offences are *delitti* which infer a penalty greater than exile, from the local jurisdiction of the minor Courts competent to try *leggieri offese*. When, as in the case of the Madiai, the act is presented as a *delitto*, the documents, including the depositions, are laid before a Court of Accusation composed of three Judges, who, like all in Tuscany, are removable, and who decide by a simple majority of votes. All prisoners are defended by counsel; and if the prisoner does not choose one for himself, an advocate is assigned to him by the Court. As in England, the Court has no power of remunerating the assigned advocate; but the law gives to every advocate, whether assigned by the Court or chosen the prisoner, a right of action against the client for his fees—a right which, I scarcely need say, is very little exercised.

Before the Court of Accusation the prisoner may be again examined, and the crown advocate, the *Procuratore Regio Generale*, has a right to be heard. The Court too has the power of ordering the attendance of fresh witnesses, and of taking all such steps as are necessary to prevent a failure of justice. By the law of 1838, the counsel for the prisoner has no right to interpose in this stage of the proceedings; indeed, his interposition is prohibited in express terms, yet in practice he does appear, and did so in the case of the

Madiai; and the privilege, if refused, would probably now be claimed as a right—a very short usage being, according to the principles of Tuscan Jurisprudence, sufficient to operate by way of repeal of the written law of the state. If by the decision of the Court the case is ordered for trial, the prisoner has the right of *ricorso* to the Court of Cassation, if he should be advised that a miscarriage has occurred in the conduct of the case; as for instance, if a decision which finds a “true bill” against him, as we should say, has been arrived at by a smaller number of votes than the law requires; or again, if he should be advised that the acts charged against him do not amount to a *delitto* or crime. It is, for various reasons, not always thought prudent to exercise this right. If the decision of the Court of Cassation sustains the *ricorso*, the case is sent back to be dealt with according to the decision of the superior Court,—to be amended, if the defect admits of amendment, and if not, to be abandoned. On the other hand, should there be no *ricorso*, or should the *ricorso* fail, the case goes at once before the *Corte Regia* for trial, and it immediately becomes the duty of the *Procuratore Generale* to prepare an *atto di accusa*, an instrument answering the purpose, and far more than answering the purpose, of our bill of indictment. This instrument ought to begin by specifying the crime charged. It ought then to give a compendious report of all the important facts disclosed in the proceedings, and in particular those of which the legal effect is to aggravate or lighten the accusation, and it ought to end with the statement that the prisoner is the individual accused of the crime set forth in the decree by which he is sent to trial, designating him by his name and employment, and citing the law which applies to his charge.¹ The *atto di accusa* being lodged and a copy given to the prisoner, his counsel is permitted a free inspection of the proofs against his client, and if he intend to call witnesses, he must give notice of their names and of what they are expected to prove. This being done, the President of the Court permits such of the witnesses to be summoned as appear to him from the note of their expected evidence it would be useful to the ends of justice to call,

¹ Motu proprio, Agosto, 1838.

and they are brought at the public expense. The prisoner always having the right, as with us, to produce at his own expense any evidence he may judge material to his interests.

As the law does not always allow arrests in the first instance, it sometimes happens that the prisoner is not placed in custody until after the *atto di accusa* has been lodged. The accusation being thus brought, the prisoner is then interrogated by the President of the Court before which he is to be tried, this interrogation being limited by law to ascertaining the identity of the prisoner with the person accused, and of receiving from him such declarations as he may please to make.

The evidence for the prisoner, as well as for the Crown, is in the first instance given in the form of deposition, and if upon considering these depositions, the President thinks other witnesses desirable, additional depositions are taken. The investigation by depositions being now complete, the case is ripe for public trial, and the depositions are, as with us, *functio officio*. The witnesses are examined and cross-examined, as with us, except that the questions are put by the President, who uses the deposition by way of brief, the counsel on either side only interposing with suggestions for his adoption. The advocate for the defence has the last word, and I have passed by several other provisions which are also intended for the benefit of the prisoner. Two objects are steadily kept in view throughout this system of procedure, — first, that justice shall not be defeated, either on the one side or the other, by surprise or miscarriage; and, secondly, that an innocent prisoner shall have every possible facility for proving his innocence. The decree of accusation and final sentence are both *motivati*, — that is, the reasons are given, and in the latter, the facts as found by the Court are set forth. After the sentence in the *Corte Regia*, there may be again a *ricorso* on points of law to the Court of Cassation, the highest Court in the realm, to be again followed by a *decreto motivato*.

If, then, justice be not attained in the Courts of Tuscany, it is not for want of painstaking. The mass of labour cast upon the Judges and the officers of the law must be enormous. But while one cannot withhold one's admiration from the motives which have impelled the Sovereign to throw so

many safeguards around the accused, it must not be forgotten that the latter, if innocent, will necessarily pay a heavy price for these advantages in the length of time which elapses between the charge and the acquittal; and such delay is aggravated whenever an important case like that of Guerazzi arises to occupy the tribunals. The hardship, to an innocent prisoner, of an unfounded accusation and its results did not escape the attention of Peter Leopold, and his Code provides for compensation by the public to the calumniated sufferer. I understand, however, that this provision has seldom or never been acted upon. By the kindness of the Cavaliere Peri, the philanthropic and intelligent Superintendent of Prisons, I had an opportunity of inspecting the Murate, the principal prison of Florence, where I saw several men employed in printing. I mistook them for convicts, but was informed they were untried prisoners who had been under accusation for a period of sufficient length to enable them to acquire the art which they were practising. All possible distinctions are made, it is true, between prisoners before trial and prisoners after conviction. It is felt that, with regard to the former, the only legitimate object is to ensure that the prisoner shall be forthcoming when the time arrives for meeting the charge made against him, and he is consequently allowed much liberty in his expenditure. He is permitted to purchase what food he pleases; books are allowed to him, and I saw the cell of one prisoner nicely decked with flowers.

The school of criminal jurists of which Beccaria was the founder, who look upon proximity of punishment to the offence in point of time as exercising a deterrent power of great importance over the mind of a person under temptation to crime, will at once perceive and appreciate the mischief of the long interval which the law of Tuscany, by its delay, interposes between the criminal act and its penal consequences. It is, no doubt, a very difficult question, — perhaps the most difficult connected with the law of criminal procedure, — to adjust the contending claims of promptitude on the one hand and full and minute investigation on the other. Whenever our own system shall be carefully ex-

amined with a view to improvement, this question will have to be considered with much more care than has hitherto been bestowed upon it, if up to the present time it has indeed been examined at all. When such inquiry takes place, however, it must not be assumed as a self-evident proposition, that the more extensive and searching is any judicial investigation, the greater the probabilities of arriving at the truth, because another principle steps in, which, though scarcely recognised by those whose avocations have not made them familiar with the administration of justice, will be at once admitted by all whose experience has given them the opportunity of seeing how little trustworthy testimony is which either follows at a distant period after the facts to be proved have taken place, or when it has been much canvassed by the witness and his companions, or subjected to the frequent cogitations of his own mind. Evidence cannot be too fresh, nor can the witness be too unconscious of the effect of his statements on the fate of the cause, whether civil or criminal. On the other hand, the perils to which we expose justice in England, from allowing witnesses to be put into the box without previous notice to the opposite party, is enormous. Take the case of an *alibi*, where a story is so easily substituted and so difficult of detection by the most acute and experienced cross-examiner. How important is it that the character and what the French call the *antécédents* of the witness should be known to those who are opposed to him, and that he should be aware they are known! The want of a test for an *alibi* must sometimes lead to an unjust conviction. Jurymen inexperienced in the duties of their office often yield up their belief too readily to the evidence of an *alibi*, if stoutly maintained by the witnesses; but, after a time, a revulsion takes place, and they reject statements as well supported as those to which they formerly gave credit; and as the majority of *alibis* are false, they are right in this rejection more frequently than wrong. But this is a poor consolation to those who are unjustly convicted, although they may form a small minority of the whole number accused. In this particular, then, I cannot but think we should do well to adopt the Tuscan

plan of proceeding. With regard to the payment, by the public, of the cost which the prisoner is under the necessity of incurring for his defence, nothing but inveterate usage could blind us to the cruel injustice of withholding from him the pecuniary means of establishing his innocence. Nor can it be to the public interest to punish any but the guilty. On the contrary, wherever the machinery by which the law is administered is so defective as not with certainty to distinguish between guilt and innocence, every one of us is placed in jeopardy and exposed to a calamity in comparison with which all the ordinary evils of life are as nothing.

I must therefore think it very discreditable to us to lag behind other nations in providing, so far as money can effect the object, against the danger of condemning the innocent. In Belgium, in the State of Massachusetts, and probably in other countries, the law on this subject is the same in principle as in Tuscany. It would be very desirable that means should be taken to ascertain the state of the criminal law in those countries where it is known to have occupied the attention of able men, now that we are looking forwards to change in that most important branch of our Jurisprudence. The different methods of *Procedure*, with their results so far as they are capable of being analysed and referred to particular provisions, might throw much light upon the subject. I never could understand why our diplomatic relations with the various nations of the world, might not be made the means of furnishing this and other information of a similar kind. A resident in any country, enjoying the influence and facilities which attach to a representative of the British Crown, would obtain full and trustworthy information, under circumstances which would baffle all attempts by a stranger, however earnestly made.

I have nothing to say in this place of political struggles, of which Tuscany, in common with other Italian States, has been of late years a theatre, except to remark that they appear to have resulted in producing a strong reactionary spirit in the Governments, which doubtless believe, in all sincerity, that the peace of the country depends on keeping

a tight rein over popular impulses. Many changes in the law have been made, and all in the opposite direction to those of Peter Leopold, and of the present Grand Duke himself in former years.

The punishment of death was again established, in the month of November last, and was extended to the offence of "*Violenza contra la religione*," whatever that offence may be. This is bringing back with a vengeance the mischiefs of figurative legislation, so justly denounced by Leopold in the instance of the *Læsa Majestas*! What but a metaphorical meaning can be put on the phrase, "violence against religion?" And if the Courts resort to metaphors on this subject, what is there that an honest Protestant may say or do which cannot be brought within the peril of such a law? Happily, the temper of the people and the horror of capital punishments known to be entertained by the Prince, who in spite of all appearances, I believe to be a person of mild disposition, together with the public opinion of the whole world, which would range itself on the same side, are impediments against bringing this law into action which I persuade myself will never be surmounted. But to find it introduced into the Statute-book of a nation which has taken such rank in the intellectual world as the Tuscan, and, as far as I know, introduced for the first time in this the latter half of the nineteenth century, is a mournful and humiliating fact. It cannot escape observation, that every return to the old vindictive principles of Jurisprudence, condemned by Peter Leopold, has been coincident with the restored influence of the Church. If the connection between these events be merely fortuitous, the Pope and the Clergy are an injured body of men; for nobody with whom I have spoken has faith enough in the doctrine of chances to believe it affords a satisfactory explanation of the phenomena.

But to my mind, and to that, I venture to predict, of every lawyer, these menaces of sanguinary penalties are much less fearful than the extension of the power of the police, which was made at the same period. As the law is now amended, every person in Tuscany is liable to imprisonment by the

police, in a fortress or house of correction¹, for the term of three years; and you will not forget that this is a power to be exercised without trial, and where the victim cannot be even *charged* with having violated any law!

By some persons well qualified to form a sound opinion it is believed that the object of this extraordinary provision is to avoid the scandal and trouble consequent on such trials as that of the Madiai. It is thought, and probably with reason, that if conscience can be successfully cowed by law, an imprisonment for three years will effect the purpose as surely as a heavier infliction; no doubt (on the hypothesis that the government has pledged itself to a course of persecution) nothing can be more convenient than the possession of such a power as this, which puts the victim at once out of sight; whereas, after the conflict of a trial, it sometimes falls out that facts and arguments which have been insufficient to save the accused from the pains of law, or of what appeared to the Courts to be law, have had the effect on the public mind of stamping the law, supposing it to be rightly interpreted, with infamy, and, on the other hand, supposing the law to be perverted, the animadversion on the Judges has not been less severe.

Speaking of the punishment of death reminds me of the vicissitudes of that law in Tuscany. Sometime before 1786 it was abolished by Peter Leopold; and in his Code he gives his testimony in favour of the effects produced by the change. In 1790, in a fit of irritation produced by the insurrections in Tuscany against the freedom of commerce in corn, he launched an edict from Vienna, in the form of a despatch, enacting a new law of treason, and punishing traitors with death. This law was extended in 1796, and again in 1816. In 1838 there was a restriction put on the law, or at least on its administration; and sentence of death can only be pronounced where there is a unanimous vote of the Judges for inflicting this punishment. In 1847 the present Grand Duke succeeded to the Duchy of Lucca, when his first act was to abolish the punishment of death in his new dominions. This

¹ I consigli di Prefettura sono autorizzati a decretare la mutazione coatta del domicilio, la detenzione nella Casa Correzionale, e la Reclusione in una Fortezza fino a tre Anni. Edicts of Nov. 16. 1852. Art. IV.

edict was, by a latitude of judicial interpretation hardly credible to an English lawyer, held to extend to his old dominions, and so the law stood until the last month, when the edicts of 1796 and 1816 were restored and extended, and that of 1838, which required unanimity in the Judges, was repealed. Surely no power is less to be envied than that of a legislator at will. It has not only tarnished the fame of the excellent and enlightened Peter Leopold, but produced an unsteadiness of action which, combined with its rapidity, has drawn down popular sarcasm and contempt, as expressed in the following distich: —

Le leggi di Toscana
Duran tre giorni o una settimana!¹

But whether the law inflicting capital punishment remains on the Statute-book a longer or a shorter time, I have great doubts as to whether it will ever be executed. It has been long in doubt even when in existence. There had been no execution in Tuscany for nearly twenty years, until the Austrians came, who have in some instances inflicted death by military law, when the place has been declared in a state of siege. Whether any such power had been delegated by the Grand Duke I could not learn. I heard it denied.

I now come to the case of the Madiai, on which I will not pretend to conceal I have formed a very decided opinion. I am well aware that it behoves a foreign lawyer to recollect that his opinion must be of little value as compared with that of any member of the legal body to which the laws as it were belong — which has made them its own by the study

¹ In so far agreeing with those of modern Rome, any similarity with which is probably not very complimentary, as is shown by the following anecdote. I extract from the "Diary of a Nun," the production of an accomplished English lady, now no more: —

"It is a common saying at Rome, 'Gli editto durano tre giorni.' One came out some time ago, forbidding all persons to put flower-pots outside their windows, as they endangered the skulls of the passengers. An old wag immediately removed every one from his window, saying, 'Bisogna aver rispetto al governo.' On the third morning, however, his flower-pots were all seen in their usual places again. When asked the meaning of this conduct, he replied, 'Che vuole? son passati due giorni — ecco adesso il terzo. Tre giorni vale un Editto Romano, e non dura mai più.'"

and practice of years, and which is imbued with the principles and maxims by which the course of legal reasoning in the particular country is governed. Feeling, then, strongly the difficulty of my position, I have spared no pains to master the question, and to guard against the dangers which must necessarily beset my path. At the same time it must not be forgotten that the law of Tuscany is not encumbered, as too many branches of our own law continue to be, with technicalities, and what is worse with a technical logic. So far as I can learn, and I have been favoured with valuable assistance from eminent members of the Tuscan Bar, it appeals to no maxims but such as are universally used in constructing the laws of all civilised nations, and are familiar to every lawyer of every part of the world. If any exception is to be made to this remark, it will be that there seems a latitude of interpretation of written instruments established here not a little startling to foreigners. But when I inquired how such principles of construction are to be defended, or by what rules unknown to us they are governed, I obtained no satisfactory answer, nor do I find that such laxity of interpretation is very strenuously defended. It is due, however, to the Judges of the present day most explicitly to state that they are not the introducers of this vagueness, but that it has descended upon them as *damnosa hereditas* from their predecessors. You will recollect also from the instance of the interpretation, which extended the effect of an edict abolishing the punishment of death in the Duchy of Lucca, to its abolition throughout all Tuscany, that the principle to which I refer is not always used against the subject, but sometimes in his favour. Whether a more invidious examination than I have felt disposed to make would show that the course of interpretation is liable to be deflected one way or other according to the state of the political atmosphere, I spare myself the pain of surmising, being content to hope the best.

Francesco and Rosa Madiai are now so well known in England, by reputation at least, and the facts out of which their sufferings have arisen have been laid before the public in so much detail, that it is unnecessary that I should do

more than call your attention in the course of my remarks to such of them as at the moment bear on the point under consideration. I should premise that the whole proceedings are not published. What has been given to the world is the "*atto di accusa*," the "speech and conclusions" of the *Procuratore Regio Generale*, the learned and very able defence by the advocate Maggiorani, the *sentenza motivata* of the *Corte Regia* and the *relazione* by the *Consigliere Relatore* (one of the Judges), to the Court of Cassation, containing a *resumé* of the proceedings in the Court below, an abstract of the facts of the case collected from the *sentenza*, and a recital of the *ricorso*, with the grounds as set forth by the advocate for the prisoners. The proceedings before the Court of Cassation, which are also published, are founded on this *relazione*, and consist of Signor Maggiorani's speech, the *Procuratore Generale's* answer, and the judgment of the Court dismissing the *ricorso*. From this enumeration it will be perceived that I have no means of forming an opinion upon the facts, because the evidence is not given. It would have been furnished in abstract at least, by the reporters of the *Gazetta dei Tribunali*, but the Court, on the application of the *Procuratore Generale*, held its sittings with closed doors. I have, however, had too much experience of the blunders which are every day made by those who profess to review the findings of Courts of Justice on matters of fact, by reading reports, however faithfully made, that I should have felt myself bound not to set up my opinion against that of the Judges appointed to weigh the evidence, and who had the advantage of hearing it given *vivâ voce*. My remarks will therefore be made on the assumption that the facts, as given in the *Sentenza* of the *Corte Regia* are true.

It appears, from the *atto di accusa*, that the two Madiai, and a third person, Pasquale Casacci, were sent for trial, accused of impiety. The Madiai with having been engaged in the work of propaganda and of proselytism to the "*Confessione Evangelica o del puro Vangelo*," not only by teaching but by the diffusion of books and printed tracts, to the injury and disgrace of the Catholic Religion dominant in the Grand Duchy. The case of Casacci I pass over. It

had nothing to do with that of the Madiai, and in England would have been tried separately.

The charge, then, resolves itself into one of simple proselytism, by certain indicated means, which might be public or which might be private; and the law which the *Procuratore Generale* cites, as applicable to the case, is the 60th article of the Leopoldine Code, which is as follows: — “Whoever, with an impious object, shall dare to profane the Divine mysteries, by disturbing the sacred rights (*sacre funzioni*) with violence, or shall otherwise commit public acts of impiety (*l'empietà pubbliche*), and whoever shall publicly teach maxims contrary to our Holy Catholic Religion, for which we have always nourished, and perpetually shall nourish, our constant love and zeal, we will that, as a disturber of that order by which society is governed and maintained in tranquillity, and as an enemy of society itself, he shall be punished with the greatest and most exemplary rigour, and never with a less penalty than labour in public (*pubblici lavori*) for a time, or for life, according to the circumstances of the case.” By subsequent laws *pubblici lavori* have been in all cases commuted for labour in prisons. According then to the Leopoldine Code, and also according to the law as it existed between 1848 and 1852, when the acts alleged against the Madiai took place, a sentence to labour in prison was the *capital*, or as it is sometimes called, the *exemplary* punishment of Tuscany. And it is the second class of this punishment, that is to say, *lavori a tempo*, which the *Procuratore Generale* demands in his *conclusion*, and which was eventually imposed by the Court.

Both the *crime* and the *penalty* must therefore be sought in this article of the Leopoldine Code, and in that alone.

The first and main question, then, for determination must be, is Proselytism of itself an affair within the Article?

Proselytism is clearly not mentioned, and when it is considered that the term was well-known, had always a clear and exact meaning, and that this act, when it results in the conversion of a Roman Catholic, is denounced by his Church as a horrible sin, its omission furnishes a strong argument

that it was intended to be omitted—and the argument is greatly strengthened when we find that each offence is considered as a crime not in relation either to religion or to morals, but with regard to public order, and *to that alone*.

The first offence is that of profaning the divine mysteries by disturbing the sacred functions (or, as we should say, disturbing a religious service) with violence. Many modes of interference with the religious duties of others not amounting to violence may be devised which would be revolting to all pious minds, and would inflict much pain on those whose devotions were disturbed, but they clearly would not fall within the description of the first offence. The second offence is that of committing public acts of impiety. Here it is obvious that the Legislator did not intend to vindicate religion or he would have punished impiety, wherever it could be detected, whether committed in public or in private. The third and last offence is that of publicly teaching heterodox opinions. But if he intended to forbid proselytism, why introduce the word “public?”—If proselytism is a crime, the evil lies in the conversion or perversion of the person whose faith is changed; and to make the question of offence or no offence turn on whether that change was wrought secretly or openly, would be as preposterous as to frame a law against murders committed in public, omitting all reference to private murders? If, however, the description of the three offences had left any doubt that publicity was an essential ingredient, it would have been removed by the statement that the offender was to be punished as *a disturber of order*, and of that tranquillity by which society is maintained. To hold that proselytism is of itself made a crime by this article is repugnant to the whole context in two ways—the public teaching which is made criminal may not be followed by a single conversion and yet the offence is complete, or a conversion may be made strictly in private, and then the ingredient of publicity is wanting, and in such a case the requirements of the law remain unsatisfied. Is it not then clear to demonstration that proselytism, so far as the law is concerned, is just as much beside the question as Jesuitism, or any other of the many *isms* that vex the world? The

advocate Maggiorani, in his admirable defence, puts an additional argument at once refined and convincing. Teaching followed by conversion is less dangerous to public order than attempts to convert which are unsuccessful. In the one case there is at all events harmony between the preacher and his converted hearers; in the other, there is a collision of minds and tempers which may produce the disturbance to public order which the Legislator contemplates. Instances to prove the truth of this argument rise at once to the mind. When St. Augustine converted by his preaching our Saxon countrymen by thousands, there was no disorder. When our missionaries, with more zeal than worldly prudence, attack the native superstitions of India with results anything but satisfactory, we hear enough, and as some excellent persons think, too much, on the danger to the peace of society, and to the stability of British rule.

But was proselytism in the year 1851 an "impiety" at all? By the law of 1848 all the civil and political disabilities which attached to dissidence from the Roman Catholic faith were abolished. How then can it be held to remain a crime to induce a person to a change of religion when the state held that the convert is just as well fitted for offices of trust and confidence as he was before? Is it not then quite evident that with reference to an accusation framed on the 60th Article of the Code of Peter Leopold an inquiry respecting proselytism is altogether impertinent, and that it furnishes another illustration of the truth, well put by him who said that half the controversies in which the world is engaged are on questions which ought never to have been raised? The *sentenza*, it is true, makes a show of coming to the proof that proselytism is an offence within the article under consideration. After stating that the fact of proselytism was proved against the Madiai as regards one young woman in their service, the *sentenza* then proceeds:—"It remains only to examine if in such a fact are found the ingredients [*estremi*] required by Article 60., so as to sustain the application of its penal sanctions."

Here the true point is fairly stated. But when I look for the proof that proselytism is a crime within the provisions of

the law cited, I find only this bold assertion — the foundation for which I must leave you to discover, if you can, — “that the crime of impiety, by means of proselytism, is *manifestly* contemplated in the last division of the 60th Article” (*i. e.* the public teaching of heterodox opinions). Add to this the statement that “the penal laws, according to the opinion of the most enlightened writers, recognise proselytism as a crime punishable by the secular Courts [*delitto civilmente impitabile*]” and you have all which this “*sentenza motivata*” contains on the subject of the alleged crime of proselytism; this last statement, I hardly need say, doing nothing towards proving that proselytism is an offence within the 60th Article of the Code, or rendering the party convicted of it liable to the highest order of punishment known to the law, which punishment is expressly affixed to each of the three divisions contained in the article. If other penal laws make proselytism a crime, and if those laws, whatever they may be, can be considered in force after the fundamental law of 1848, then a charge founded on those laws might be supported, and would lawfully subject the party convicted to some punishment of some kind, but here, where the charge is founded on a particular law to which a particular punishment is attached, it is monstrous to sustain a conviction upon that law by calling in aid some opinions relating to other laws inflicting (for all that appears to the contrary) a very different punishment. Surely the Tuscan Courts have at the least shown a strange indifference to their reputation abroad by sending forth a decree so ill sustained by the *reasoning*, as in courtesy we will call it, by which its most extraordinary conclusions are attempted to be defended. When the Judges of Tuscany felt themselves impelled by the form of law to deliver a judgment which has astonished all Europe, it is much to be lamented that they did not demonstrate that compulsion by conclusive arguments and severe logic, which should have exonerated them as lawyers and as men from all suspicion of having arrived at these conclusions on light and frivolous grounds. Far be it from me to insinuate any charge of corruption, founded merely on a difference of opinion. I have differed *toto cælo* from many decisions of

our own Courts, and have had reason to know that some of those which, in my own small way I have had occasion to make, have met with a similar fate. My remark therefore must be confined within the literal import of the terms in which it is conveyed.

An attempt is made, both by the *Procuratore Generale* and the Court, to sustain the judgment on the ground that the acts of teaching given in support of the charge of proselytism were public and to a sufficient extent to satisfy the terms of the law; and decisions were cited to show that if the acts charged were performed in the presence of more than three persons, if they immediately afterwards became public, and if *scandal* followed, they were public acts within the meaning of the 60th Article. I shall not occupy much of your time in discussing this. It is quite clear that if such a definition of the term Publicity as this is could be supported, the course to be taken against the prisoners was obvious; they had impugned the doctrines of the Roman Catholic Church by *public teaching*, and had thus brought themselves clearly within the third clause or division of the Article. But on such an hypothesis we should have heard nothing of "proselytism." The charge however as made, and which alone the accused were called upon to answer, was not for public teaching, but for proselytism by certain indicated means, which may be public or may be private. Certainly if the case cannot be sustained on the ground of proselytism, "*pur et simple*," it will not be aided by this crotchet of private publicity. For supposing the law to have been pointed against private meetings for worship, it is quite clear from the speech of the *Procuratore Generale* that the accused must have been convicted, as the meetings were not only private but secret, the police having been for some time frustrated in their attempts to "surprise" the persons assembled at these meetings. Now a state of jurisprudence in which the same act could be held private or public, according as the law constituted privacy or publicity an offence, would be too monstrous even for the purposes of religious persecution. So much then for the trial before the Corte Regia, which concluded with sending back the Madiai to separate

prisons; the husband for fifty-six months, the wife for forty-five months, to be computed from November, 1851. I will, however, here add the deposition of a nun in favour of the Madiai, which is printed in the very valuable Report, which Signor Maggiorani has published, of his defence. It shows not only the Madiai, but the nun herself and her abbess, and also her bishop, in an amiable light; I say the abbess and the bishop also, because, without the consent and even the concurrence of her superior, the nun would have been unable, if willing, to afford the accused the benefit of her testimony.

“The undersigned Sister Rosa Felice Massei, a professed nun in the Convent of the Visitation di Santa Maria di Massa in Val di Nievole, called the Salesiane, and who until the end of the year 1847, the time at which she entered the Monastery, bore the name, of Annunziata, daughter of Mariano, Massei of the Baths of Lucca, and was for some time also called Assunta; declares as the strict truth, that she knew, before she entered the convent, Rosa Pulini and Francesco Madiai, now husband and wife, and living in Florence, having lived with the former as fellow servant in different foreign families for the space of about two years, that is to say, from 1844 to 1846, (*salvo errore*). She declares that she has always considered them, judging by their actions, honest, true, and charitable in the highest degree; that, as to religion, it certainly was evident to her, even at that time, that Rosa Pulini belonged to an heterodox communion; but the manner both of Rosa and of Madiai was always marked with the greatest and most scrupulous respect, for the religious opinions of others; that she never knew or suspected that they went about diffusing opinions or books contrary to the Roman Catholic Apostolic Faith, or insulting by sign, word, or deed, its ministers or objects of worship; and much less that they attempted by these or any other means to make proselytes to their own religious communion. That certainly they never did or attempted to do this with her; that, on the contrary, as to Rosa Pulini, now Rosa Madiai, she can bear testimony to some facts which plainly demonstrate the tolerance and respect which she professed for the Holy Catholic religion, and they are as follows:—

“1. First, on an occasion when some members of a Protestant family, in whose service she, Annunziata Massei, now Sister Rosa Felice, had been at Torre Luserna, refused to provide meagre food for her on fast days, Rosa Pulini not only expressed disapprobation but represented to the head of the family that he

ought not, in justice and humanity, to do violence to the religious opinions of the said Annunziata, and impose upon her the painful necessity of either transgressing the precepts of her faith, or of providing at her own expense the meagre food enjoined by the Catholic Church.

"2. In the second place, when Massei, who had been for some time in that family in the capacity of nursemaid, received warning at Torre Luserna, for no other reason (at least, as was supposed) than for her strict observance of the precepts of her religion, especially in attending the Catholic Church, Rosa Madiai defended her before her employers, maintaining the liberty of conscience and the principle of religious toleration. To these remonstrances, her employers partly yielded, retaining Massei in their service, although no longer as nursemaid, but in an inferior situation, as general servant. Rosa Madiai, who did not consider that Massei ought to be either sent away or reduced to a lower position, expostulated again, but without effect.

"3. In the third place, when Annunziata, now Sister Rosa Felice, was in service with another Protestant family, who lodged in the house of the Madiai, and by which family she was provided only with meat food, she begged the Madiai to let her dine at their table, and thus enable her to obey the precept to fast, which the Madiai willingly consented to, had her to dine with them on fast days, and provided meagre food for her during the whole time that she, Annunziata, lived in that family.

"In conclusion, she, Sister Rosa Felice Massei, declares that, after the intimate acquaintance she has had with the Madiai, she can distinctly and conscientiously testify that she considers them to be incapable of failing in that due respect which every well-educated person, although belonging to a different faith, ought to show towards the Catholic religion and form of worship.

"This is the spontaneous and conscientious declaration of the said Sister Rosa Felice, given in the presence of her reverend Mother Superior in the aforesaid convent, and which she sends, written and duly signed by the same Mother Superior, to be used for all honourable purposes, not excluding the producing it on the trial.

"I, Sister Rosa Felice Massei, declare the above to be perfectly true.

"I, Sister Anna Maria Bartoli, Superior of the Monastery of the Visitation of Santa Maria di Massa in Val di Nievole, certify that the Sister Rosa Felice Massei has freely and spontaneously given and signed this testimony in my presence.

"The undersigned Pietro Forti, Bishop of Pescia, certifies

that the above is a free and spontaneous declaration, and that the two signatures, Massei and Bartoli, are genuine in their respective rank as nuns professed in the Monastery di Massa in Val di Nievole, called the Salesiane.

"And in faith,

"PETER, *Bishop of Pescia.*"

It has been supposed that after her conversion, Rosa Madiai took part in rites and ceremonies which a Protestant must condemn. I find, however, no sufficient evidence of a criminal compliance. There is, thank God, much in common in both religions, and some things are indifferent. In them conformity under circumstances in which the feelings of others would otherwise be wounded, may be rather a merit than matter of reprisal. To give a Roman Catholic the means of making observances to which he feels himself bound by religious duty is, I must think, an act of Christian brotherhood which, speaking for myself, I should have no hesitation in performing. Nor ought we to forget that the Roman Catholic ritual, though sometimes almost revolting to us born and brought up in a Protestant land, yet to Rosa Madiai is connected with early associations, which may leave it an object of affection, although it has been discarded by her reason. The views of this poor Italian on the great question of religious liberty appear to me, I feel bound to say, perfectly sound and enlightened. But whatever opinion Protestants may form of the propriety of such indulgence towards the professor of the faith of her youth, it is marvellous that it had no effect on the minds of the prosecutors and the Court. That Rosa Madiai was engaged in any general undertaking of conversion, it is impossible to believe. It was only as regards a few persons towards whom she felt kindly, and who probably had no lively faith of any kind, that she made any such attempts, and they were always individuals who were united to her either by being members of her family, or by their being the objects of her humble but unsparing charity. The *Procuratore Generale* spoke favourably of the sacred rights of conscience; but what liberty of conscience has he who, though he may himself hold such opinions as he believes essential to his future happiness, is prohibited from imparting them to those who are dear to

him? and yet Casacci, who was tried with the Madiai for the proselytism of his own son, was acquitted on the ground that his heterodox teaching had been ineffectual to its object, but he was recommended to the watchful care of the police,—a supervision anything but desirable, I am told, in Florence.

The trial having been adverse to his clients, their advocate, whose courage, fidelity, and zeal were equal to his talents and learning, prepared a *ricorso* to the Court of Cassation. His grounds of objection were two-fold. First, that the facts as they appeared in the *sentenza* did not amount to a crime within the meaning of the law, on which the judgment of the Court below proceeded; and secondly, that even admitting an offence to have been committed, by reason of the *quasi* publicity which I have described, it was not punishable by the capital or exemplary punishment affixed to it by the sentence, but only exile or imprisonment exclusive of hard labour. Practically speaking the second objection was as important to the prisoners as the first, for if the crime could have been reduced to a minor offence, the prisoners would have been entitled to their freedom, from the length of time (twelve months) during which they had been in confinement; unless indeed the Judges had given a sentence of unusual severity, which is not to be presumed. The Court of Cassation pronounced a decree confirming the sentence of the *Corte Regia*: but it is a most significant fact that the *Procuratore Generale* himself was so convinced by the argument of Signor Maggiorani on the second point, that he not only abandoned his case, but made himself a powerful address to the Court in support of that portion of the defence;—the *Procuratore Generale* being a magistrate and not a mere magistrate, therefore felt it to be his duty to aid the accused even against what are sometimes improperly called the interests of the Crown, which can have no real interest in illegality and injustice. The ground taken against the punishment was as follows:—the course of reasoning by which the acts committed with *quasi* publicity were made to amount to a crime within the meaning of the 60th Article, necessarily proved that the offence was not subject to the penalty affixed by that Article to acts of impiety accompanied by full publicity.

The course of reasoning is this, that the 60th Article does not, either in words or by implication, repeal former laws regarding impiety, nor are the three species of impiety there enumerated to be considered as exhausting to the subject, but they are to be held as examples selected for exemplary punishment, because aggravated by publicity. And further, with regard to the precedents which had been relied on, the *Procuratore Generale* fully supported the statement of the advocate for the defendants, that none could be found in which, when publicity in the true and strict sense of the word did not exist, the exemplary punishment had ever been inflicted. This honourable conduct of the *Procuratore Generale*, and the learning and ability which he displayed in maintaining his altered view of the case, are worthy of all praise, and will easily induce us to pass over, as a trifle, his imperfect acquaintance with our Protestant institutions, which led him to state that the Bible Society was founded by the French in 1792, and came into England after the extravagancies of the fanatic Joanna Southcote!

The Court, however, was unconvinced by the arguments of both the learned advocates, and the *ricorso* was dismissed. Signor Maggiorani is about to publish his argument before the Court of Cassation, which hitherto has only appeared in the *Gazetta dei Tribunali*. It is much to be hoped that the whole proceedings will appear in an English dress. They will have an interest for every English lawyer who studies his profession in a liberal spirit, and who desires to derive a similar advantage from foreign law which our surgeons derive from comparative anatomy. In a time of change like the present such knowledge is particularly to be desired. If the trial of the Madiai offers but few suggestions for imitation, at least it affords matter of warning. But something, perhaps, may be learnt in both ways. The most important lesson which I myself have drawn from reading it is, that the spirit in which laws are construed is at the least as important as the laws themselves. The spirit of interpretation which appears to prevail in Tuscany is at once vague and astute, as you will have gathered from the preceding remarks. But the astuteness, I am sorry to say, is not always in favour of the accused. Signor Maggiorani cited in the course of his

defence the maxim which governs the proceedings of Criminal Courts in England, that criminal laws are to be construed with strictness, so as not to extend their operation beyond the plain and clear meaning of their words. He claimed its protection for his clients, however, without effect; and I was, consequently, desirous to know whether or not the maxim was considered of the same authority in Tuscany as in England; although, as it is derived from the Roman law, I could not entertain much doubt on the subject. I was answered in the affirmative; and my information comes from a source on which I can rely. I subjoin the authorities which were furnished to me in support of the statement; but I should add, that my informant told me that, as in England, the rule was universally admitted; and that he had never felt called upon to search for authorities until I requested him.

“That the interpretation of penal law ought to be always strict or restrictive, *i. e.* in favour of the accused, is a principle laid down by Emerigon, in ‘l. 42. ff. de Pœnis,’ where he says, ‘interpretatione legum pœnæ, sunt potius molliendæ quàm asperandæ;’ and also by Paul, ‘l. 155. ff. de Reg. Jur.,’ where he says, ‘in penalibus causis benigniùs interpretandum est.’ This principle of favourable interpretation in matter of Law appears always to have been followed in Jurisprudence; so that at this day we are in the habit of appealing to it without seeking to justify the appeal by citing authorities.”

Nor would an intimate acquaintance with the proceedings against the Madiai, and especially with the discourses of their advocate for the defence, be interesting to lawyers only. Signor Maggiorani has treated largely that part of his subject which relates to liberty of conscience, and brought a host of authorities from the Fathers, and from Roman Catholic writers of the highest value. This is a source of knowledge on this subject not much explored by Protestants, who will perhaps be surprised, and agreeably surprised, that the principles of religious liberty have long found able and illustrious advocates even within the pale of the Church of Rome. But on this subject, and on the present state of religious opinion in Italy, and the state of other points connected with its Jurisprudence, I may send you a further letter.

After all, we cannot but feel attached to Florence, and under obligations to its government. Its fine climate, its noble architecture, the unbounded wealth of its churches and galleries in works of surpassing and marvellous excellence, the liberality with which these vast storehouses of wonders are thrown open to the enjoyment of all the world,—these, with the pleasant English society into which a fellow-countryman is admitted with great facility and kindness,—all these things very much indispose the traveller to an unfavourable report. He remembers too that he is in a land fertile above all others (at least since the days of old Greece and Rome) in great men. Here, in a territory even smaller than it now is, and with a capital of only half its present population, sprung into existence, amidst a multitude of lesser but still famous men, Dante, Michael Angelo, Galileo; each the foremost leader in his own sphere of mind, not in Tuscany, not in Italy, but in the world. Standing in the Church of *Santa Croce*, the Westminster Abbey of Florence, and looking upon the monuments of the mighty dead, I could not but feel that, if I were not an Englishman, I should account it a high privilege to be a Tuscan. In this temper of mind I went to the beautiful edifice which the present Grand Duke has raised to Galileo's honour; that same Galileo whom our Milton visited, as he tells us, then "grown old a prisoner to the Inquisition for thinking otherwise on astronomy than as the Franciscan and Dominican friars taught." Here, in a spacious hall encrusted with marble, adorned with a statue of the persecuted astronomer, of whom Tuscany is now so justly proud, I looked, not without emotion, at the first telescope ever pointed to the skies! What a world of contradictions! He who first gave power to the eyes of his fellow men to gaze on the wonders of the heavens wastes his precious days in the bitterness of persecution, because his sublime truths have overwhelmed the stunted intellect of the friars! And here is a noble memorial to the memory of a scientific heretic, whose doctrines were condemned by an infallible Church, which therefore has never withdrawn its censures, and this memorial the work of a Prince who has cast into prison two humble Christians who, like the great Philosopher, lay hold

upon truth, but who, unlike him, and in so far superior to him, refuse to recant their faith!

Ponder, my dear Sir, on these things; and you will discern, I think, a good omen in them. These two acts, inconsistent as they are, may tend to the same ultimate result. By the one the Grand Duke has raised a monument, on the field of the battle itself, to record a signal triumph of *Truth over Infallibility*. Of the thousands who are year after year drawn by veneration or curiosity to enter that rare and costly shrine, there is not one but must feel that even the most devoted Papist sometimes hears a voice within which denounces to his conscience as insane and blasphemous the pretension of any created intellect, even the most exalted, to be exempt from liability to error. The more complete the subjection to priestly authority of the Sovereign who has nevertheless embodied in stone the protest of himself and his people against the condemnation of their great Florentine, so much the more conspicuous and undeniable is the power of truth, which has thus wrought unconsciously (it may be) on the mind of the Prince, and led him to proffer to the world a testimony, the effect of which it was not given to him to apprehend. Neither, on the other hand, did he foresee the consequences of his dealings with the Madiai, whereby he has evoked again some portion at least of the spirit which drew away from the Church of Rome the men who have since that great separation been by themselves and their successors the leaders of mankind in its progress towards a higher civilisation—an enterprise in which they have had but few colleagues among those over whom the Church of Rome wields her leaden sceptre. On this memorable prosecution then, our children will look back, as giving the date of another expansion of the Protestant influence; and even to the sufferers the consolation may be vouchsafed of knowing that the affliction which they have borne has been the appointed means of rescuing multitudes from a worse than Egyptian bondage!

Ever yours,

MATTHEW DAVENPORT HILL.

ART. V.—LEGAL EDUCATION.

PUBLIC EXAMINATION : — HILARY TERM, 1853.

THE COUNCIL OF LEGAL EDUCATION have approved of the following Rules for the Public Examination of the Students. To afford a longer period for preparation, the Council have postponed the Examination until the 22nd, 24th, and 25th days of January, 1853.

The attention of the Students is requested to the following Rules of the Inns of Court : —

“As an inducement to Students to propose themselves for Examination, Studentships shall be founded of Fifty Guineas per annum each, to continue for a period of three years, and one such Studentship shall be conferred on the most distinguished Student at each Public Examination; and further, the Examiners shall select and certify the names of three other Students who shall have passed the next best examinations, and the Inns of Court to which such Students belong, may, if desired, dispense with any Terms, not exceeding two, that may remain to be kept by such Students previously to their being called to the Bar. Provided that the Examiners shall not be obliged to confer or grant any Studentship or Certificate, unless they shall be of opinion that the Examination of the Students they select has been such as entitles them thereto.”

“At every call to the Bar those Students who have passed a Public Examination, and either obtained a Studentship or a Certificate of Honour, shall take rank in seniority over all other Students who shall be called on the same day.”

Rules for the Public Examination of Candidates for Honours, or Certificates entitling Students to be called to the Bar.

An Examination will be held in next Hilary Term, to which a Student of any of the Inns of Court, who is desirous of becoming a candidate for a studentship or honours, or of obtaining a Certificate of Fitness for being called to the Bar, will be admissible.

Each Student proposing to submit himself for Examination, will be required to enter his name at the Treasurer's Office of the Inn of Court to which he belongs, on or before Wednesday, the 12th day of January next, and he will further be required to state in writing whether his object in offering himself for Examination is to compete for a Studentship or other honourable distinction; or whether he is merely desirous of obtaining a Certificate preliminary to a call to the Bar.

The Examination will commence on Saturday, the 22nd of January next, and will be continued on the Monday and Tuesday following.

Each of the three days of Examination will be divided as under : — From half-past Nine, A. M., to half-past Twelve. From half-past One, P. M., to half-past Four.

The Examination will be partly oral, and partly conducted by means of printed Questions, to be delivered to the Students when assembled for examination, and to be answered in writing.

The oral Examination, and printed Questions, will be founded on the Books below mentioned; regard being had, however, to the particular object, with a view to which the Student presents himself for examination.

In determining the question whether a Student has passed the Examination in such a manner as to entitle him to be called to the Bar, the Examiners will principally have regard to the general knowledge of Law and Jurisprudence which he has displayed.

The READER ON CONSTITUTIONAL LAW and LEGAL HISTORY proposes to examine on the following Books: — *Hallam's Constitutional History*, vols. i. and ii.; *Clarendon's History of the Rebellion*, vols. i. and ii.; *May's History of Parliament*; *Rapin's History of the Reigns of Elizabeth to James II.*, inclusive.

Those who present themselves to obtain distinction will be examined more minutely, and expected to answer more difficult questions, drawn from the same sources, and to be acquainted with the important statutes and trials of the

period; and also to answer questions relating to the progress and alterations of English Law during the aforesaid reigns.

The READER ON EQUITY will examine in the following books:—

1. *Milford on Pleadings in the Court of Chancery*; *Calvert on Parties to Suits in Chancery*, chapters i. and ii.; *Story on Equity Jurisprudence* vol. i., and chapters xvii. and xviii., vol. ii.; the *Act for the Improvement of Equity Jurisdiction*, 15 and 16 Vict. c. 86.

2. *Sir James Wigram's Points in the Law of Discovery*, "Defence by Plea;" the remainder of *Story's Equity Jurisprudence*, vol. ii.; the principal Cases in *White and Tudor's Leading Cases*, vols. i. and ii.

Candidates for Certificates of Fitness to be called to the Bar will be expected to be well acquainted with the books mentioned in the first of the above classes.

Candidates for a studentship or honours will be examined in the books mentioned in the two classes.

The READER ON JURISPRUDENCE and the CIVIL LAW proposes to examine in the *Roman Law of Persons* as contained in the *Institutes of JUSTINIAN*, and as explained and illustrated by HEINECCIUS (*Elementa Juri Civilis*); and BOWYER (*Modern Civil Law*).

Candidates for a studentship or other distinction will be expected to answer all questions of principle suggested by the text of the *Institutes*. They will also be examined in MACKINTOSH, *Law of Nature and Nations*; BENTHAM, *Principles of International Law*, vol. ii., pp. 535 et seq. of Bowring's edition; MONTESQUIEU, *Esprit des Loix*, livre 28.; SPENCE, *Equitable Jurisdiction of Court of Chancery*, Part I., book 1., chap. vii.; Part I., book 2., chap. vii.; Part I., Appendix; STORY, *Conflict of Laws*, chapter on "Capacity of Persons," and "Domicile."

Candidates for a Certificate will be examined exclusively in BOWYER, *Modern Civil Law*, chap. i. to chap. xii.; MACKINTOSH, *Law of Nature and Nations*; SPENCE, *Equitable Jurisdiction of Court of Chancery*, Part I., book 1., chap. vii.; STORY, *Conflict of Laws*, chapter on "Capacity of Persons."

The READER on the LAW OF REAL PROPERTY proposes to examine in the following books and subjects:—

BOOKS.—*Class I.*—2 *Blackst. Com.*, or 1 *Steph. Com.*, book 2.; 1 *Spence, Eq. Jur.*, book 2., chap. iv.; book 3., chap. i.—vii.; *Cru. Dig.*, tit. 11, 12, 16.; *Buller's Notes to Co. Lit.*, 191 a., sect. 2. 5.; 271 b.

Class II.—*Shelford on Mortmain*, chap. iii.; *Roper on Legacies*, chap. xix.; *Lewis on Perpetuity*, and *Jarman on Wills*, with reference to 1 Vict. c. 26. ss. 28, 29.

SUBJECTS.—*Class I.*—The Nature of Estates of Freehold Tenure—their Quantity and Quality—their Rights and Incidents. The Nature and Properties of Uses and Trusts, prior and subsequent to the Statute of Uses. The Origin and Nature of a Lease and Release, as an ordinary mode of Assurance.

Class II.—The alterations effected by the Legislature, during the last preceding and present reigns in the Practice of Conveyancing. The Law of Mortmain; including therein the Law affecting the Alienation of Lands to Corporations, and the Disposition of Property to Religious and Charitable Purposes. The Law of Settlement; its effect upon the Rights and Liabilities of Husband and Wife, as exemplified in the case of Marriage Articles, Antenuptial and Post-Nuptial Settlements, and upon the Rights of Creditors and Purchasers under 13 Eliz. c. 4., and 27 Eliz. c. 5.

Students offering themselves for the Public Examination, and not going out in Honours, will be expected to be well acquainted with the Books and Subjects comprised in Class I.

Students offering themselves for the Public Examination, and who are Candidates for Studentships or Honours, will be expected to answer questions drawn from the Books and Subjects comprised in Class I. and Class II.

The READER on COMMON LAW proposes to examine in the following Subjects and Books:—

Class I. As to the Nature of the Common Law generally (*Stephen, Com.*, vol. i. *Introduct. s. 3.*). The Law of Principal and Agent, and of Bills of Exchange and Promissory Notes (so far as treated of in *Smith's Merc. Law*, 4th ed., book 1. chap. v., and book 3. chap. i.). The Law respecting Tenancies

from Year to Year, and for shorter periods (*Woodfall on Landlord and Tenant*, 6th ed., book 1. chap. v. ss. 1. and 2.). The Law respecting Larceny and Obtaining Money by False Pretences (*Arch. Cr. Pl.*, 12th ed., book 2. Part I. chap. i. ss. 1. and 3.).

Class II. The Law of Partnership and Corporations (so far as treated of in *Smith's Merc. Law*, 4th ed., book 1. chapters ii. and iv.). The Law of Distress (*Woodfall on Landlord and Tenant*, 6th ed., book 2. chap. ii. ss. 1, 2, 3.). The Cases of *Ashby v. White* (1 *Smith, L. Cas.* p. 105.), and *Marriott v. Hampton* (2 *Id.*, p. 237.), with the Notes thereto. The Common Law Procedure Act (15 and 16 Vict. c. 76.), so far as it treats of the Writ, Appearance, Joinder of Parties and of Causes of Action (ss. 1—41.).

Students desiring merely to obtain a Certificate to be called to the Bar, will be examined in the Books and Subjects comprised in Class I.

Candidates for Studentships or Honours will be expected to be familiar with the Books and Subjects specified in both the above Classes, and also with leading Cases (if any) bearing upon the several branches of Law therein enumerated, decided since the last editions of the Books above mentioned.

By order of the Council,

RICHARD BETHELL,
Chairman.

Council Chamber, Lincoln's Inn,
Dec. 11. 1852.

[This Document, though not all we could have wished, is a great step in advance.—ED.]

ART. VI. — PROVINCIAL JURISDICTION IN BANKRUPTCY.¹

MY LORD, — In reply to the inquiry that your Lordship has done me the honour of addressing to me, — whether it is in my opinion expedient that the functions of the Country Bankruptcy Commissioners should be transferred to the Judges of the County Courts, — I beg to state that my sentiments are in favour of that proposition, for the following, among other reasons.

The present Country Bankruptcy Courts, having been established in a few only of the principal towns of the Kingdom, are too remote from most of the country districts to dispense the Bankruptcy Law to those districts, with that degree of simplicity and economy which is indispensable to the ends of justice.

Whenever the means of legal redress are attended with such an amount of expense, trouble, and risk as no prudent man will incur for the sake of the end proposed, there is a

¹ Letter to the Right Hon. Lord Brougham and Vaux, on the Expediency of transferring the Country Jurisdiction in Bankruptcy to the County Courts; and on the Fallacy of the proposed Plan of referring Accounts in Chancery to the Bankruptcy Courts. By Arthur James Johns, Esq., Judge of the County Courts.

practical denial of justice, as complete as would be attendant on a system involving a much larger amount of expense, trouble, and risk. For this reason, I consider the existing Country Bankruptcy Courts to be quite as useless to the districts with which I am most intimately connected as a Bankruptcy Court in London would be; because, though the costs and obstructions would in the latter case be greater, they would be in both cases alike prohibitory.

I do not think that these objections can be got rid of by sending the Commissioners to dispose of Bankruptcy cases, into the different country districts. The amount of such business in all districts (excepting the largest commercial towns), is too small to furnish any reasonable justification for throwing, either on the Government or on the creditors in Bankruptcy, the expenses incident to a circuit for the single purpose of Bankruptcy cases. In many counties there will often be few or no Bankruptcy cases in the course of the entire year, and their occurrence will, generally speaking, be irregular and devoid of that approach to a uniform average, which the ordinary current of suits at law and equity presents. In years of prosperity Bankruptcies will be rare, in years of adversity and reaction they will be comparatively numerous.

I think Bankruptcy Circuits would not meet the objection, for the additional reason that it is not merely the presence of the Commissioner in the locality that is necessary for the cheap and convenient working of a fiat in Bankruptcy, still more necessary for that purpose is the presence of the inferior Officers employed in taking possession of the estate, in making out the accounts, and in carrying out all the details of management, and final distribution among the creditors. And for these objects the presence of such inferior Officers is indispensably required, not merely during a circuit; it is necessary that they should be always on the spot.

I think the Country Jurisdiction in Bankruptcy may be beneficially transferred to the County Courts, because those Courts possess in themselves all those requisites which I have pointed out as wanting in any separate Country Bankruptcy Jurisdiction. The Judges of the County Courts have already to make regular circuits for the purpose of the

business at present within their jurisdiction, and to that business Bankruptcy might be united without any sensible addition to the expenses of their circuits. I think also that, as a general rule, Bankruptcy cases would prove almost an imperceptible addition to their labours, considering the large number of circuits over which those cases would be diffused. This remark admits of some qualification in the most populous commercial neighbourhoods in which a slight addition to the number of Judges might be necessary. There is a County Clerk and a High Bailiff resident in each locality in which a County Court is held. They are constant residents, and not mere attendants on the Judge (who has to visit commonly twelve different districts in each month). They are Local Officers in the strictest sense — which he is not — and they have thus an opportunity (at the smallest possible amount of expense) of personally superintending the management and final distribution of a bankrupt's estate under the eyes of the creditors, and subject to the periodical superintendence of the Judge.

These very functions they have already exercised in Insolvency cases (embracing the failures of all traders owing less than 300*l.*;) and these and their ordinary functions as Officers of the County Courts they have fulfilled in a manner to obtain for themselves as a class the general confidence and respect of the community. As a class they are undoubtedly quite equal, in intelligence and personal respectability, to those Officers to whom analogous duties are confided in the Courts of Bankruptcy.

I think the interval of a month which commonly intervenes between two successive County Courts in country districts would be, generally speaking, a convenient interval in such districts between the successive hearings or meetings in Bankruptcy cases, in which the bulk of the business is administrative, requiring the interposition of a moderate period of time to enable the inferior Officers to carry out in detail the orders of the Court. On this ground, also, the scheme of circuits for the Bankruptcy Courts, as at present constituted, is inadmissible. Bankruptcy cases cannot be disposed of at one sitting; they require a series of sittings, each commonly occupying a short time only, but each indis-

pensable to carry such cases through a succession of necessary stages. If, therefore, the present Commissioners were sent into the rural districts, they would have to take, not merely one journey but a series of journeys, commonly on account of one single Bankruptcy, probably a mere affair of routine.

In cases of emergency fiats might be opened either before the Judge of the district or, in his absence, before the Judge of any of the adjoining Circuits, in the same manner as the Absconding Debtors' Act is worked at present.

Since your Lordship's inquiries were addressed to me, I have perused the remarks of Lord St. Leonards (as Lord Chancellor), on the causes to which he ascribes the small amount of business that has lately occurred in the Courts of Bankruptcy; an explanation which I presume his Lordship to have derived from information furnished by the Commissioners and Officers of those Courts. Among those causes the present prosperity of the country, which is obviously a prominent one, does not appear to have been enumerated.

It seems also, in the remarks to which I have alluded, to have been assumed, that the Bankruptcy business will increase in proportion as the law shall be made more sound and efficient. From that proposition, with the sincerest respect both to the noble and learned Lord and to his informants, I must beg to express my dissent as regards Country Districts; and I feel that I may do so without the slightest presumption, because the question is essentially one of facts not peculiarly within the sphere of observation of the learned Commissioners, and especially within that of a Judge of the County Courts in a circuit remote from the present Courts of Bankruptcy.

I entertain no doubt that a great portion, if not the majority, of the Bankruptcy cases that originate in my circuit are fraudulent; that the frauds often do not come before the Commissioners, because common prudence prevents creditors from incurring the expense of an opposition in a distant town. The interest of the bankrupt in obtaining his certificate is large, that of any individual creditor (in opposing) trifling in comparison. Into so unequal a contest, what rational man would embark?

Many bankrupts who thus pass through the ordeal without difficulty under the present system, would be energetically

and successfully opposed by their creditors in a Court in their own neighbourhood. Many of them would never dare to apply to the Court, and many others would be restrained, by the fear of punishment, from a course of reckless and unprincipled trading, for which they possess at present so many facilities of obtaining an immunity.

There are, doubtless, many instances of bankrupts whose reverses have been the result of unforeseen vicissitudes unaccompanied by criminality; and to such men distant and expensive Bankruptcy Courts present obstacles, at the same time that they afford facilities to dishonest traders. But, as a general rule, prevention, not cure, is, in my humble judgment, the principal purpose, and will constitute the most prominent benefit, of a sound Bankruptcy Law; and that end cannot be efficiently attained, except by means of local tribunals.

In conclusion, I may observe that, if the present Country Bankruptcy system be indefensible with reference to its original objects, it is still less calculated to be useful as a Court for taking accounts in Chancery cases. Many of the remarks I have already made with relation to the former apply to the latter topic.

The taking of a Chancery account is much more the province of the inferior Officers of Courts than of the Judges. It is a task not to be performed during the sittings, but during the intervals between the sittings; and to its cheap, speedy, and efficient performance, it is indispensable that those Officers on whom it devolves should be resident in the same neighbourhood as the suitors in the cause, in order to enable them to maintain with the parties a continuous personal communication, and to bring them together from time to time without form, loss of time, or long previous arrangement; for accounts of long standing almost invariably require a series of explanations which none but the parties themselves can give, and with which they are hardly ever fully prepared in the first instance.

The proposed transfer of the taking of equity accounts from the London offices to the Bankruptcy Courts (now established in a few of the principal provincial towns), will in most country districts afford little or no advantage, as in both cases alike the personal attendance and personal ex-

planations of the parties will be practically excluded by the expense, inconvenience, and loss of time attendant on journeys; for in order to adjust accounts by the aid of personal discussion between the suitors, there must (as previously intimated), generally speaking, be many successive meetings; and if they can only be held in a distant town, there must be several journeys. Hence, whether the accounts be taken in London or by the Country Bankruptcy Courts, the parties will commonly be obliged to make use of written evidence and of the assistance of agents, which will cost the same whether employed in London on the one hand, or in Bristol, Liverpool, or Leeds, on the other. The suggested change will thus destroy the few advantages without curing any of the vices of the Metropolitan system of taking accounts.

I may repeat my previous remark — that reductions in the expenses attendant on legal proceedings must prove nugatory for good, so long as those expenses continue to be sufficiently high to retain the character of a prohibition — a prohibition applying to all cases of moderate amount in Chancery — which can never be removed in such cases excepting through the instrumentality of Local Courts held in the immediate neighbourhood of the parties, and endowed, not merely with an auxiliary, but with an original jurisdiction.

I have the honour to be,

Your Lordship's obedient Servant,

ARTHUR JAMES JOHNES.

December, 1852.

Postscript.

The importance of Legislative enactments, rendering the aid of the inferior Officers of the County Courts available as auxiliaries in any plan that may be devised for providing a more convenient mode of taking Chancery accounts, has been touched upon by the author of this communication, in a Letter addressed to Mr. James Stewart, the Treasurer of the Law Amendment Society; from which he may be permitted to extract the following statements: —

“A large number of the cases involving accounts, which have come before me as Judge of the County Courts, have been decided in the following manner.

“The account has been referred by me for investigation either to one of the officers of the Court—or (in difficult cases), to a commercial man, or other competent person, on the understanding

that the individual selected was to act, not as a referee having a power of decision, but merely as an assistant to the Court, whose duty it was to investigate the accounts and report to the Judge on the nature of the accounts, and more especially to report, in what items the parties agreed, and in what items they differed, and the grounds of difference.

"In the great majority of cases referred in this manner one of the two following results has occurred:—either it has turned out that there were only one or two items really in dispute; these points of difference have consequently been brought before the Court, and decided, either on questions of law, or on an investigation of facts (according to the nature of the case),—or the referee has come back to the Judge with a statement that when the parties met face to face, and went over their accounts, item by item, there was no difference between them, there having been either some absurd confusion of ideas on one side, or on both,—or dishonesty on the part of plaintiff or defendant—which had led to an attempt at mystification, which had broken down at once, so soon as a close investigation of details commenced. In nearly all the cases, disposed of in this way, there has been no adjournment from Court to Court, the parties having retired for perhaps half an hour with the referee, and returned to the Judge with a clear statement of the points in difference, which were almost uniformly decided at the same sitting. Where any question has arisen involving the peculiar knowledge of particular trades, information has been obtained from competent persons in a manner suggested by the Judge, and agreed upon by the parties, who are generally willing to adopt suggestions from the Judge, which they might not have acquiesced in if offered by an opponent. Moreover, the Judge, by experience, is enabled to suggest modes of investigation that would, generally speaking, not occur to the parties." ¹

Where an account is too voluminous to be disposed of at the first sitting of the Court, I have commonly referred it to the County Clerk, either in the qualified manner above described, or left it (when such was the wish of the parties) absolutely to him, as an arbitrator, to dispose of the matter finally. I have frequently had long protracted partnership accounts settled in this manner to the satisfaction of the suitors; which, had they been brought before the Court of Chancery, or any Court established at a distance from their residence, would, in all probability ¹ have ruined both plaintiff and defendant, as well as made them enemies for life. One of the worst consequences of forcing suitors into Courts, in which they cannot meet personally, is to exclude the opportunity of mutual explanation; and thus to afford (in those

¹ See Observations on the Combination in the County Courts of the Common Law and Equity Jurisdictions. In a Letter to James Stewart, Esq.

cases in which the practitioners employed may not be men of the best or highest stamp) facilities of inflaming their differences by artful misrepresentations.

The County Clerks, who are required to be Attornies by profession, and who are compelled, by the nature of their official duties as Clerks, to keep a very minute and complicated set of books of account subject to the inspection of the Authorities of the Treasury, are thus peculiarly qualified, by habit and education, for the task of taking accounts in Chancery suits.

A large number of very troublesome cases have in the manner above described been disposed of by the County Clerks of my circuit; but they have uniformly undertaken and cheerfully completed these investigations without any remuneration, influenced by the honourable desire to make the working of the County Courts conducive to the satisfaction of the suitors and to the welfare of the community.

ART. VII.—FRENCH AFFAIRS AND JURISPRUDENCE.

WE recur to this important subject, deriving but little satisfaction from finding that what we foretold last autumn has come to pass, and a greater numerical force been ranged in favour of the Empire than had attended the preceding acts of usurpation. That no calm observer can feel otherwise than anxious, if not alarmed, in the present circumstances of France, and indeed of Europe, is certain enough; that there are gleams in the generally dark prospect is however equally undeniable; and among the favourable appearances is to be placed first and foremost the continued display of independent spirit among the members of the legal profession. To obtain their presence as a body upon the late occasion of imperial exhibition was found impossible. The man who had degraded himself to the lowest pitch by pronouncing a laboured and dull panegyric of despotism, accompanied with classical references at once puerile and inaccurate, and who has since been rewarded by promotion to the highest judicial

office, is well known to be looked down upon almost universally, by his learned brethren, under the influence of feelings of shame at belonging to the same Order with him, rather than of indignation at his efforts to bring it into general contempt. A general impression prevails, that no prospect of professional advancement can make up for the loss of public respect, and a most just estimate is made of the utter worthlessness of all expressions affecting to represent the opinion of the community through the medium of a press in a state of absolute slavery more complete, and which ought to be more galling than that under which the other parts of society are laid! While a most servile clergy has become the ready tool of the Government, almost rivalling the subserviency of the army itself, it is hoped that the sacred fire of liberty may be kept alive by the ministers of justice, the unbought, unpromoted professors of the law.

Another indication, which we deem also very favourable, is the difficulty, found quite insuperable, of prevailing upon persons of real eminence, whether from personal character or from high rank, to hold any relations of an official kind with the new dynasty, and more especially in places about court. The very few exceptions are of men so despised in society, that they have rather done harm than good to the imperial cause. Society pronounces against it; and no potentate who rules over Paris can long be easy under this sentence. It is far from unlikely that this may lead to some relaxation of the rigour (more severe than ever since the late change) with which the whole functions of the mock legislature were reduced to a mere shadow. Some portion of discussion may be allowed; yet we cannot conceal from ourselves the consequence of such a concession. The Chambers would always use any freedom thus given, with the same fear and trembling which the press shows after a first warning. They would dread some fresh act of violence not merely retracting what had been granted, but possibly extinguishing even the name of legislature.

The celebrated sect of the *Economistes* held that a despotic government was beneficial chiefly because it could, by its absolute decrees, effect useful improvements in national po-

lity, which popular ignorance made it so difficult to carry under a constitutional system. Jurisprudence is not without chapters of a like description; and it is possible that the slavery under which France now lies prostrate may receive some mitigation from certain changes in the judicial system not at present enjoying any portion of popular favour. In some instances this is owing to ignorance of the subject. For example, the glaring defects in the law of evidence, more than once pointed out by us, render all judicial investigations most uncertain in their results, making it a matter of chance whether the truth shall be ascertained or not. But these defects would by no means prove so mischievous were the evidence only to be sifted and weighed by the Judge; it is the tendency of the evidence so improperly admitted by the law as it now stands to mislead the Jury, that produces the great uncertainty of all judicial proceedings. We refer, of course, to the allowing all manner of hearsay to be given in evidence. If any one in France objects to this, or rather denounces it as wholly incompatible with trial by jury, he is met by the vulgar and ignorant assertion that jury trial being the best method of inquiry, it is impossible to have too many facts (as they are called) brought to the knowledge of the jury; whereas the rumours which every witness is suffered to tell, and which he has heard from persons whom he needs not name, are all so many sources of deception instead of information to the jury. Again, the allowing the jury to apportion the offender's punishment as well as to decide on his guilt by letting the verdict find "*extenuating circumstances*," though all rational men must disapprove of it, yet could not be given up without much objection by the public at large. Jurors even are attached to it, for one of the main reasons which prescribe its abandonment. In very many, perhaps in most cases, the finding results from a kind of compromise either among the jurors whose opinions differ on the question of guilty or not guilty, or between the conflicting feelings of the jurors themselves, who are uncertain as to the bearings of the evidence on that question, or are averse to the punishment which the law has awarded. No one can observe the kind of cases in which

these verdicts are returned, and not be convinced that such is their origin. We have given these instances of amendments in the law which an absolute government may effect with peculiar facility. They are of the greatest importance, and would remove two of the greatest blots in the judicial system of our neighbours. That there are others is undeniable, and some for the removal of which the general feeling both of the profession and of the community would entirely concur with the opinions of more speculative jurists. Among these the security of all persons against unjust arrest and prosecution by such an alteration of the law respecting bail (*caution*) has been more than once dwelt upon in this Journal; and the present Government could certainly not do a more popular thing than introducing such an amendment of the Criminal Jurisprudence, attended as it would be by no sacrifice whatever of its own prerogatives. There are other improvements in the law that fall within the former description, of changes which an absolute government can make more easily than one controlled by popular assemblies; but unhappily the most important of all is one likely to find little favour with rulers who rely upon the destruction of all intermediate authorities between the multitude and themselves. We refer to the great vice in the French system, the source of all the instability of the monarchy and the bane of agriculture, we might add the main obstruction to general improvement—the law which ordains of necessity the infinite subdivision of property. It is almost as great a cause of embarrassment in the judicial as in the economical and political system. Unhappily the feeling in its favour is deeply rooted and universal; and as they who govern by setting the mass of the ignorant and the poor on one side, and the respectable classes on the other, are little likely to increase the influence of the latter, we are fated to see an arrangement perpetuated under which the gross absurdity exists, and in districts almost within sight of the capital, of a single tree held in property by fifty persons, each of whom is owner of an undivided fiftieth part. But if that which forms the great obstacle to agricultural improvement is *carefully* neglected, not so the means of certain mercantile operations; the greatest encouragement

has been given to speculations in the money market. Never since the time of Law has such gambling in shares been known. Fortunes have been realised in the course of a few months almost equal to those which the Mississippi scheme created and destroyed in as many weeks or days. In the midst of all this, comes a decree on which the greatest store was set, and which was passed even by the subservient senate with some difficulty, giving the head of the state an absolute power of making treaties and tariffs, of course without the least notice to the public. But those at the head of affairs are also, of course, in the secret; and can conduct their operations in the market with an advantage which needs only be mentioned generally to be fully comprehended. Let us hope that the thirst of gain which is supposed to prevail among the military authorities near the head of affairs, may be slaked rather in the interior of the country, and at the moderate expense of its inhabitants, than at the far more ruinous cost to them and to all nations of external operations.

This is the great alarm which now possesses men's minds, not indeed in France, but in all other countries. Thankful for having escaped from the nearer dangers of anarchy, the French have not yet had time to reflect on the risks they run of being once more led by the ambition and the avarice of a few men to disturb the peace; and pay for military glory by the ruin of their trade, the desolation of their fields, and the final invasion of their country. Anxious for peace themselves, they willingly shut their eyes to the danger that threatens them; and eagerly catch at verbal assurances dealt out just when and where they are profitable to the dealer, while they shut their eyes to all the acts which are done in the very opposite direction. It is even said that while writings which recommend in the most undisguised manner a policy of aggression, are disavowed by authority,—an authority armed with the power of preventing any such from seeing the light,—these very publications are distributed in places the resort of the soldiery. We cannot believe this; we think the trick too clumsy to be tried. But that such writings are suffered; that language of the same kind is endured among

those having access to the head of the State, that on the late occasion of his progress it was if not encouraged yet certainly never checked, is undeniable; and the utmost that can be urged in extenuation of this double dealing, is the necessity of giving a vent to the bad feelings prevailing in certain quarters. We do not stop to remark that giving vent is also giving encouragement; but we regard with unmixed satisfaction the two important facts, that the other powers of Europe, fully warned of their peril, are well prepared for their defence, and that they are resolved to unite as one man in resenting and in punishing any aggression in any quarter. This satisfaction must be shared by the French themselves, because their best security against the calamities of war is the conviction of their rulers that it would be fatal to them.

ART. VIII.—LIMITED LIABILITY IN PARTNERSHIP.

1. *Report on the Law of Partnership, to the President of the Board of Trade.* Ordered to be printed March, 1838.
2. *Report of the Select Committee of the House of Commons on the Law of Partnership, together with the Proceedings of the Committee, Minutes of Evidence, Appendix, &c.* Ordered by the House of Commons to be printed July 8. 1851.
3. *Replies from Foreign Countries to Questions relating to the Law of Debtor and Creditor, and to the Law of Partnership.* Circulated by the Committee of Merchants and Traders of the City of London, appointed to promote the Improvement of the Law relating to Debtor and Creditor. W. Clowes & Sons, 1851.
4. *An Inquiry as to the Policy of Limited Liability in Partnership.* By HENRY COLLES, Barrister-at-Law. Published by the Social Inquiry Society of Ireland. James M'Glashan, Dublin, 1852.
5. *A Letter to the Right Honourable Henry Labouchere, M. P., on the Formation of Companies and Partnerships, and limiting the Liability of their Members.* By JOHN NEWALL, Parliamentary Agent and Solicitor. Vacher & Sons, Westminster, 1852.

Few subjects of late years have more attracted (and deservedly so) the attention of Law Reformers than the existing

state of the Law of Partnership; hence the Parliamentary Inquiries and other Reports, at the head of this paper. With regard to the administration of the law of partnership generally, it is to be hoped that the recent changes in the Courts of Chancery and Common Law will have a beneficial effect, by enabling them to decide with greater facility, especially in matters of accounts, any disputes which may arise between partners. But neither the Court of Chancery nor the Courts of Common Law as at the present constituted, are fitting tribunals for the determination of mercantile questions. Not only is the mode of administering mercantile law faulty, but the principles upon which the Courts proceed demand a careful revision, so as to render them, what all laws ought to be, suited to the convenience of that important class of the community whose transactions are regulated by them.

The Select Committee on the Law of Partnership (1851), after recommending a greater facility in granting Charters, under rules published and enforced by proper authorities also, recommends "the appointment of a Commission, of adequate legal and commercial knowledge, to consider and prepare, not only a consolidation of the existing laws, but also to suggest such changes in the law as the altered condition of the country may require, especial attention being paid to the establishment of improved tribunals to decide claims by and against partners, in all partnership disputes; and also to the important and much controverted question of limited liability of partners." (Report of Select Committee, p. viii.)

With regard to this recommendation of the Committee it is to be hoped that any such Commission will have a wider scope for their inquiries, and that instead of being confined to the state of the Law of Partnership, it will be extended to the whole system of our commercial law, and not merely to that of England, but also to that of other parts of the United Kingdom, viz. Ireland and Scotland; so that their labours might furnish the basis of what the great majority of the mercantile men of the United Kingdom so much desire,—the assimilation of the mercantile laws of England, Ireland, and Scotland, and their reduction to a well considered and

uniform Code, of which an improved mode of procedure would form by no means the least important part.

It will be observed that the Select Committee call the especial attention of the proposed Commission "to the important and much controverted question of limited and unlimited liability of partners." Whether, in fact the partnership known in France as *société en commandite*,—in which the liability of some of the partners called *commanditaires* is limited to the amount of their capital,—should not be introduced into this country.

They recommend, what is in effect equivalent to the adoption of the partnership *en commandite*, viz. "that power be given to lend money for periods not less than twelve months, at a rate of interest varying with the rate of profits in the business in which such money may be employed, the claim for repayment of such loans being postponed to that of all other creditors: that, in such case, the lender should not be liable beyond the sum advanced; and that proper and adequate regulations be laid down to prevent fraud."

As far as experience goes partnerships *en commandite* (and they have now stood the test of centuries) appear to have been productive of much good. They were in existence as far back as the middle ages in Italy, and were applicable both to mercantile transactions by sea or land, and even to agriculture. They appear to have given great impulse to, if not mainly to have sustained, the great commercial prosperity of the Italian republics of that period. They seem to have owed their origin to the prohibition of trading to nobles and to the loan of money by any person at interest, then stigmatised under the name of usury. It was not however considered usurious to receive, as a *partner*, a share of the profits, in proportion to the capital advanced to a merchant on any undertaking, nor, as *commanditaires* were unknown to the world, was it considered beneath the dignity of a noble to become one. The ingenious idea, of making the lender of capital liable to the losses to the extent only of his contribution, encouraged the direction of capital towards that kind of investment: it was found convenient to draw profit from money without engaging in personal responsibility. Capital, stricken with sterility by the prohibitions of the Church, found then in

commandite a lawful and lucrative opening. From Italy, partnerships *en commandite* have been introduced into almost every country of Europe with the exception of England, and have been adopted into many of the states of North America.¹ In all these countries it seems to be the general opinion that they have contributed greatly to commercial prosperity, and are well calculated to bring dormant capital into active and useful employment.²

Of late many efforts have been made to introduce partnerships *en commandite* into this country; and, properly guarded, as they might be, against frauds, they would, it is conceived, be of the greatest utility. As their merits do not rest in mere theory, but are founded upon extensive and long-established experience, it might reasonably be demanded of the persons who oppose their introduction to show that there is something peculiar, either in the habits of the people or in the laws of this country, which renders this species of partnership either unnecessary or likely to lead to injurious results. The principle of partnerships *en commandite*, as to the limited liability of the partners, has been adopted in this country in royal charters or acts of parliament constituting companies for the purpose of *public* undertakings, such as railway, gas, or water-works, docks, &c. The expense, however, of charters or acts of parliament, even if they were to be obtained for *private* undertakings, would most effectually prevent an application for them, except when they were on a large scale, requiring a large amount of capital.

This is forcibly pointed out, and remedies suggested, in the Letter of Mr. John Newall to the Right Hon. Henry Labouchere, which is well deserving of an attentive perusal.

So far back as the year 1781-2, the Anonymous Partnership Act (21 & 22 Geo. 3. c. 46.), the principle of limited liability was recognised and adopted; for in that statute, which is entitled "An Act to promote Trade and Manufacture by regulating and encouraging Partnerships," the preamble states

¹ See the evidence of J. G. Phillimore, Esq., before the Select Committee.

² See Replies from Foreign Countries to Questions relating to the Law of Debtor and Creditor, and to the Law of Partnership; where, however, it appears that partnerships *en commandite*, divided into shares transferable like railway shares in this country, are open to many objections, and are not in general successful.

“that the increasing the stock of money employed in trade and manufacture must greatly promote the commerce and prosperity of the kingdom, and many persons *might be induced to subscribe* sums of money to men well qualified for trade, but not of competent fortune to carry it on largely, if they were allowed to abide by the profit or loss of the trade for the same, and were not to be deemed traders on that account, or *subject thereby to any further or other demands than the sums so subscribed.*” This Act Mr. Colles states, in his able and useful “Report to the Social Inquiry Society of Ireland” (p. 24, 25.), to have had a very limited and not very encouraging operation; but he very fairly accounts for its want of success by the fact that “the Act itself interferes imperatively in the matters which parties most desire to have left to their own discretion. One is as to the amount of capital, which must not be less than 1000*l.*, and must not exceed 50,000*l.* But another and more important restriction is, that the parties may only draw out half their profits on each settlement of accounts, the remaining half being retained as a security against loss or to meet liabilities.”

Except in the above-mentioned cases, where a limited liability is conferred either by charter or act of parliament, and except, in Ireland, in cases under the Anonymous Partnership Act, every partner, even a dormant or concealed partner, will be liable, when discovered, for all the debts and liabilities of the partnership. The same also is the case with respect to a person advancing money to a firm at a rate of interest varying with the profits of the concern; for it is thought that, as he takes away part of the profits upon which the creditors depend for the payment of their demands, and which they consider as it were a security, he must be looked upon as a partner, to whom therefore all the liabilities of a partner attach.

It cannot be doubted that in this country there is in the hands of a large number of small or moderate capitalists an aggregate capital of large amount, for which they are desirous of obtaining investments with a higher rate of interest than can be got in the funds. This is shown by the large amount of British capital which has from time to time been invested in foreign loans, works, &c. Nor can

it be doubted that much more would be invested at home if it were allowable to invest capital in partnerships *en commandite*, or if loans to a partnership at a rate of interest varying with the profits of the concern (as recommended by the Select Committee) did not constitute them partners and so render all their property liable for the debts.

Formerly an objection might have been raised to a loan of this nature, and to partnerships *en commandite*, that they were in fact only the means of obtaining for a sum advanced a rate of interest varying with the profits of the concern, and therefore coming within the principle of the laws against usury (though, as we have before seen, they were not considered in Italy to fall within this objection); but as these principles have, at any rate as regards commercial transactions, been abandoned, this objection seems to be no longer tenable.¹

Another objection is, that the introduction of these partnerships would lead to undue speculation, and that small capitalists would probably be the prey, either of sanguine or fraudulent adventurers, who, as the managing partners, would have complete control over the direction of the partnership affairs. Supposing, however, partnerships of this nature to be unobjectionable in other respects, this objection cannot have much weight in a country where persons, *sui juris*, are not forbidden to enter into whatever legal contracts they choose. If, for instance, there is no law to prevent persons from advancing money on a loan got up by a great capitalist, to a foreign state, or for public works in a foreign state (investments which experience has shown are of a very questionable nature), why should any obstacles be thrown, or allowed to remain, in the way of persons desiring to invest their money, with limited liability, as partners in private undertakings at home?

The principle of limited liability is admitted to be without objection in cases where charters or acts of parliament confer that boon upon shareholders in undertakings of *public* utility. But in *private* undertakings why should not the parties themselves be left to judge of their utility, that is to say, of

¹ Reply to Queries of J. Stuart Mill, Esq., Appendix to Report of Select Committee on the Law of Partnership, p. 160.

the probability of their making them a proper return for the use of their money ?

Another objection is, that it is unjust that a person should obtain profits and throw his losses upon innocent parties. This objection is without weight, for in partnerships of this kind properly guarded with due publicity, third parties would have no right to demand that persons who in effect contract with them, for a limited liability, should be liable to the full extent of their property. Moreover, it may be shown that partnerships *en commandite* are preferable to loans at interest, to the rate of which there is now no limit if land is not part of the security.

Suppose, under the present system, a tradesman carries on business with a capital of 10,000*l.*, 5,000*l.* of which is borrowed money, and for which there is now no law preventing the lender obtaining any amount of interest — for instance, a fixed interest amounting to the average rate of the profits of that particular trade.

Now, in such case, credit may perhaps be improperly given to the 5000*l.* of borrowed capital, since the public has in general no means of knowing that it is not the trader's own money. Whereas, in a partnership *en commandite* (properly guarded) the persons dealing with the trader would know what portion of the capital belonged to another, and it would be his own fault if he did not limit his credit accordingly. Moreover, the lender would be entitled to prove as a creditor if the concern turned out unsuccessfully ; whereas, in the case of a partnership *en commandite*, the *commanditaire* would, to the extent of his capital, be liable to the creditors, and would therefore have an additional motive for prudence, and less temptation to speculation. Moreover, a partner *en commandite* cannot withdraw his capital suddenly as a creditor can, and probably often does so, when it is most wanted to carry on speculations upon the successful issue of which the concern may almost wholly depend. This being the case, no person can reasonably object to the general introduction of partnerships *en commandite*, unless he is also prepared to condemn, and in a still higher degree, what is now permitted by law, carrying on a business with

borrowed capital. If trade is prevented from being carried on either with partners *en commandite* or with borrowed capital, then, if the prohibition is confined to the one case, it has the partial effect, if extended to the two cases, the complete effect, of giving a monopoly to those who either by process of time or succession have become possessed of capital.¹

The great capitalist profits by the present law, as it has the effect of driving away from home, or keeping as it were dormant, capital, which would under the proposed system be brought into competition with his, and thus lessen his profits; but, on the other hand, the system which would diminish the profits of the great capitalist, would, by bringing more capital into active use, be favourable to labour by raising the rate of remuneration.² This, as well as the difference of opinion which often exists amongst men, perhaps equally well qualified to form one, on any change of law, may account for much of the opposition to the general introduction of partnerships *en commandite*, notwithstanding its almost universal use on the continent of Europe, its adoption by many states of the Union in North America, and of its principle in *special* cases even by ourselves.

The question then arises, to what species of undertakings partnerships *en commandite* should be applicable. It appears, from evidence on the subject from all quarters, that they are not in general well adapted to large undertakings of a *public* character; and from some of a commercial character, "as banking and making insurances," they have been excluded in the United States and elsewhere. Such undertakings might still, as at present, be carried on in proper cases, with limited liability of the partners, either under charter or act of parliament (the expenses of obtaining which ought to be very much diminished); but with respect to undertakings of a *private* character, whether "mercantile, or mechanical, or manufacturing," ordinary partnerships *en commandite* might be applicable; but, as those kinds of partnerships appear not to have been successful where the partners are numerous, and the shares are transferable, as in the case of shares in

¹ See Appendix to Report of 1851, p. 160.

² *Ib.* p. 165.

public companies, the number of *commanditaires* or partners with limited liability might very properly be confined to six or seven.

Many examples are given in the minutes of evidence before the Select Committee on the Law of Partnership, in which partnerships *en commandite* would be of great use. For instance, cases in which clerks in whom their former employers have confidence (p. 18.), or where young tradesmen (pp. 30-39.), or skilled mechanics (p. 29.) desiring to start in business, have relatives and friends with small capitals, which they are willing to intrust to them. So again, the retiring partner of a firm would often be willing to leave a part of his capital with his old partners, which he is now unwilling to do, when the result of his participating in the profits by leaving part of his capital in the concern, although he took no part in it, and his name was not held out to the world as a partner, would be to render him liable to "his last shilling and his last acre" (pp. 19-38.).

Another instance is mentioned in which partnership *en commandite* would be of very material assistance to a very deserving, but often a very unfortunate class of men, viz. inventors, the fruits of whose labours and genius too often go to enrich the money-lender or capitalist. Mr. Fane (a great authority upon such a subject) says in his evidence, "In the course of my professional life, as a Commissioner of a Court of Bankruptcy, I have learned that the most unfortunate man in the world is an inventor. The difficulty which an inventor finds in getting at capital involves him in all sorts of embarrassments, and he ultimately is, for the most part, a ruined man, and somebody else gets possession of his invention." (P. 82.).

Of course it is necessary, in case partnerships *en commandite* are introduced into this country, to provide by due registration and publicity of the contract of partnership, and other regulations, to prevent either the withdrawal of the partners *en commandite* or their capital from the concern, in case it be unsuccessful, or their intermeddling with the affairs of the partnership so as to gain undue credit for the partnership. These ends appear to be well attained by the statute relating

to limited partnerships of the State of New York (see Appendix to the Report on the Law of Partnership, 1838, p. 73.), taken in a great measure from the regulations of the *French Commercial Code*. There it is declared, that a limited partnership for the transaction of any mercantile, mechanical, or manufacturing business within the State, may consist of one or more persons jointly and severally responsible, according to the existing laws, who are called *general partners*, and one or more persons who furnish certain funds to the common stock, and whose liability shall extend no further than the fund furnished, and who are called *special partners*. The names of the special partners are not to be used in the firm, which shall contain the names of the general partners only, without the addition of the word *company*, or any other general term; nor are they to transact any business on account of the partnership, or be employed for that purpose as agents, attornies, or otherwise; but they may, nevertheless, advise as to the management of the partnership concern. Before such a partnership can act, a registry thereof must be made in the Clerk's Office of the County, with an accompanying certificate signed by the parties, and duly acknowledged, and containing the title of the firm, the general nature of the business, the names of the partners, the amount of capital furnished by the special partners, and the period of the partnership. The capital advanced by the special partners must be in cash, and an affidavit filed stating the fact. Publication must likewise be made for at least six weeks of the terms of the partnership, and due publication for four weeks of the dissolution of the partnership by act of the parties prior to the time specified in the certificate. No such partnership can make assignments or transfers, or create any lien, with the intent to give preference to creditors. The special partners may receive an annual interest on the capital invested, provided there be no reduction of the original capital; but they cannot be permitted to claim as creditors, in case of the insolvency of the partnership (3 Kent. Comm. 34.).

To these safeguards others might be added; for instance, one as suggested by Mr. James Stewart in his evidence before the Select Committee (p. 46.), that, if the *comman-*

ditaire or special partner did not pay up the whole of his capital, he should be liable to the whole extent of his property.

The same result should follow if the partnership went on trading after a certain amount of the capital was lost.

Altogether, we consider this subject as ripe for useful legislation; and we shall be indeed surprised if in the important law reform session about to open, a bill is not brought in, fully discussed and probably carried, establishing, with due precautions, the principle of limited liability in partnership.

ART. IX. — DISSERTATIONS IN CONVEYANCING.

A PURCHASER'S REMEDY AGAINST INCUMBRANCES INDEPENDENT OF COVENANTS FOR TITLE.

IF a contract, entered into by a vendor, amounts to an agreement to sell and convey a clear and absolute fee simple, and that is implied unless the contrary appears¹, he must of course free the estate from all known incumbrances before he can compel payment of the purchase-money: and in such case it matters not whether the incumbrances be or be not contingent, or whether the covenants for title, to be entered into by the vendor, will extend to them or not. The right of a purchaser to have only a qualified warranty for the future enjoyment of the estate, such as the ordinary covenants for title entered into by a vendor, cannot affect his right to have a clear fee simple conveyed to him in the first instance so far as regards titles, charges, and incumbrances that are known. Indeed, it is apprehended that a vendor may in general be required to covenant that he is not privy to any adverse title, charge, or incumbrance that does not appear.

Hence, although a purchaser has paid his money and entered into possession, yet if he is evicted before the conveyance is complete, he may recover the purchase-money in an action for money had and received, although the intended covenants for title do not extend to the title under which the

¹ 8 Mee. & Wels. 244.

estate is recovered, and although the vendor was not aware of the adverse title when the contract was entered into.¹

Sir Edward Sugden says if a purchaser, before executing the articles, has notice of an incumbrance which is contingent, and it is by the articles agreed that the vendor shall covenant against incumbrances, the purchaser has entered into them with his eyes open, has chosen his own remedy, and equity will not assist him; and he cannot, therefore, detain any part of the purchase-money.² It seems difficult to assent to this as a general rule, and the case of *Vane v. Lord Barnard*³, upon which it is in part founded, is open to much observation. There Lord Barnard, upon the marriage of his son, covenanted to settle an estate, and that the settlement should contain covenants that he was seized in fee, good right to convey, and that the trustees should enjoy free from incumbrances. It appears that the estate was subject to a contingent charge of 6500*l.* for such of the children of Lord Barnard as should survive him; but this charge was not mentioned in the articles, but the parties to them had notice of it *aliunde*. A bill was filed to have a specific performance of the articles, and that Lord Barnard should pay off or give collateral security against this contingent charge of 6500*l.* But it was decided that it was not necessary for Lord Barnard either to pay off or give security for the contingent portion on the ground that the covenant to be entered into by him that the trustees should enjoy free from incumbrances did not require it. This reason may be allowed, but it does not seem to have occurred either to the Bar or the Court that the existence of such a charge was quite incompatible with the covenant that Lord Barnard had good right to convey. Although a purchaser, before entering into a contract, has notice of an incumbrance, he may surely require it to be discharged if it is inconsistent with what the vendor contracts to sell. But if a conveyance has been executed by all the necessary parties, and the purchase-

¹ *Cripps v. Reade*, 6 T. R. 606.; *Johnson v. Johnson*, 3 Bos. Pul. 162.; *Jones v. Ryde*, 5 Taunt. 488. See and consider *Vane v. Lord Barnard*, *Gilb. Eq. Rep.* 6.

² 2 V. & P. 418.

³ *Gilb. Eq. Rep.* 6.

money paid, and the purchaser is evicted by a title to which the covenants do not extend, and of which the vendor had not notice, the purchaser cannot recover the purchase-money either at law or in equity.¹

And even in such a case, if a purchaser is evicted by a title which appears on the face of the abstract, and was consequently patent both to him and the vendor, but which was overlooked by the purchaser's counsel, the purchaser cannot recover his purchase-money.² For the rule is, that as equity suffers no man to overreach another, so it helps no man who hath overreached himself without any practice or contrivance of his adversary. So, if a purchaser neglect to look into the title, it will be considered as his own folly, and he can have no relief.³ The rule is the same, though the conveyance by the vendor in fact passes nothing.⁴

It seems that, if the conveyance be actually executed, the purchaser can obtain no relief, though the purchase-money be only secured.⁵

But if a vendor is aware of a defect of title to the whole or a material part of the estate, and conceals it, he, having suggested that he had a title, is guilty of fraud; and the purchaser may bring an action, or he may file his bill in equity to be relieved from the purchase, though he has not been evicted. And in such a case the vendor was decreed to repay the purchase-money, with costs, and likewise all expenses incurred in relation to the sale and for repairs, which was all the purchaser asked by his bill.⁶

So in *Schneider v. Heath*⁷, where a ship was sold "to be taken with all faults," it was held that the vendor could not avail himself of that stipulation, if he knew of secret defects in her and used means for preventing the purchaser from

¹ *Serjeant Maynard's Case*, 3 Swanst. 651.; 2 Freem. 1.; *Early v. Garrett*; 9 Barn. & Cr. 928. (in this case there was a conveyance); 4 Mann. & Ry. 687.

² *Urmston v. Pate*, 4 Cru. Dig. 90. s. 64.

³ *Roswell v. Vaughan*, 2 Cro. 196.; 2 Sug. V. & P. 426.

⁴ *Bree v. Holbeck*, Ding. 654.

⁵ 2 Sug. V. & P. 426.

⁶ *Edwards v. M'Leay*, Coop. 308. S. C.; 2 Swanst. 287.; *Gibson v. D'Este*; 2 You. & Coll., N. C. 542.

⁷ 3 Camp. 508.

discovering them, or made a fraudulent representation of her condition at the time of the sale.¹

So it was decided that a person who lets premises must be taken to do so under an implied condition that they are in a habitable state, and that the tenant might quit as soon as he discovered the nuisance or defect. In one case the walls were in a dilapidated state; in another the sewerage was imperfect; and in another the house was infested with bugs.²

In *Smith v. Marrable*, Mr. Baron Parke observed: "This is not the case of a contract, on the part of the plaintiff, that the premises are free from the nuisance; but it rather rests on an implied condition of law, that the plaintiff undertakes to let the premises in a habitable state."

But this was soon overruled, and it was decided that on a demise of houses or lands there is not any implied warranty that the property is fit for the purpose intended³; and *Smith v. Marrable* was only justified on the ground that it was a mixed demise of a house and furniture.

It may here be observed that, in an action for rent, the tenant has no defence so long as his estate or term continues.⁴ A tenant pleaded that the land was permanently overflowed with water; but the Court said "le soile remaine, et le lessee avera le pisce en le eaue."

Although the vendor has fraudulently concealed incumbrance, yet the purchaser cannot follow the purchase-money after it is disposed of by the vendor. In such a case, the remedy is under the covenants for title.⁵ But purchase-money cannot be considered as irrevocably disposed of when merely paid into Court; if sufficient ground be shown, as misrepresentation of rent by a vendor, the Court will give compensation out of the funds paid in.⁶ But if there be no misrepresentation or concealment by the vendor, payment of purchase-money into Court is the same as payment to the

¹ *Schneider v. Heath*, 3 Camp. 508.

² See *Smith v. Marrable*, 11 Mee. & Wels. 5., and cases there cited; and see *Cornfoot v. Fowke*, 6 Mee. & Wels. 358.

³ *Sutton v. Temple*, 12 Mee. & Wels. 52.; *Hart v. Windsor*, Ibid. 68.

⁴ 12 Mee and Wels. 79. et seq.

⁵ *Cator v. Earl. of Pembroke*, 1 Bro. C. C. 301.; 2 Ibid. 282.

⁶ *Cann v. Cann*, 3 Sim. 447.

vendor, and it cannot be recovered after the title is accepted and conveyance executed.¹

In a case where a vendor filed a bill for a specific performance of a contract for the sale of a mansion house, and it was proved that the premises had the dry rot, and that this was known to the vendor, and that he had concealed and misrepresented the fact, the defendant, admitting the contract, was held entitled to compensation.²

In these cases we may remark, that the knowledge of the agent is the knowledge of the principal; for, as Lord Kenyon observed in *Doe v. Martin*³, "the maxim, that the principal is civilly responsible for the acts of his agent, universally prevails, both in Courts of Law and Equity." But a principal is not bound by declarations made by an agent *after* the contract.

ART. X.—THE CONFERENCE ON THE COMMERCIAL LAW OF ENGLAND, IRELAND, AND SCOTLAND.

THIS important and interesting event in the history of the Amendment of the Law, "came off" (in sporting phrase) on the 16th of November, and has fully answered the expectations of all who were concerned in it. The Conference was recognised as the first Meeting held in the metropolis, in which the mercantile community of the United Kingdom had an opportunity of assembling together and stating their wishes, and consulting as to the remedy for the grievances which affect them.

Referring to the Article on the proposed Conference in our last Number⁴, we shall now bring down the history of the movement to the present time, regretting that we can devote so little space to the subject.

¹ *Thomas v. Powell*, 2 Cox, 394.

² *Grant v. Munt. Coop.* 173.

³ 4 T. R. 39.

⁴ Art. XIV. *antè*, p. 205.

“THE PROGRAMME OF THE CONFERENCE WAS AS FOLLOWS:—

“I. On Monday evening, the 15th, at 7 o'clock, a Preliminary Meeting will be held.

“1. To adjust the proceedings of the Conference.

“2. To receive reports and suggestions from the Members of the Deputations.

“II. On Tuesday, the 16th, at 1 o'clock, the Conference will meet. Lord Brougham, the President of the Law Amendment Society, will take the chair.

“A statement of the objects of the Conference, and resolutions founded upon it, will be submitted.

“III. On Wednesday morning, the 17th, from 12 o'clock, A.M., the rooms of the Society will be open for the use of the Deputations.

“The Members of the Deputations are requested to leave their town addresses at the rooms of the Society, 21. Regent Street.

“THE RESOLUTIONS PASSED AT THE CONFERENCE WERE AS FOLLOWS.

“Moved by the Right Hon. M. T. Baines, M.P. (Leeds), seconded by Charles Turner, Esq., M.P. (Liverpool).

“‘I. That the Mercantile Laws of England, Ireland, and Scotland are scattered and disconnected, and in many instances dissimilar and even antagonistic; a state of things tending greatly to restrict and embarrass commerce by producing uncertainty, perplexity, and delay.’

“II. Moved by T. E. Headlam, Esq., M.P. (Newcastle), seconded by Germaine Lavie, Esq. (Incorporated Law Society).

“‘II. That it is highly desirable that a well-digested and well-arranged body of Mercantile Law should be framed and established for the whole of the three kingdoms.’

“Moved by W. N. Massey, Esq., M.P. (Newport), seconded by Alexander Hastie, Esq., M.P. (Glasgow), supported by James Aspinall Turner, Esq., President of the Commercial Association (Manchester).

“‘III. That, dismissing all local and even national prejudices, the assimilation and improvement of the Mercantile Laws of the Three Kingdoms, and the improvement, and, where requisite, the assimilation of the procedure, should be effected by selecting those principles and rules, where-

ever they may be found, which shall be deemed the best and most beneficial to the commercial classes and to the community at large; and that to this end it is necessary carefully to examine the Mercantile Laws, and to have recourse to the experience of other countries.'

"Moved by Robert Baird, Esq., Writer (Glasgow), seconded by William Rand, Esq., President of the Chamber of Commerce (Bradford).

" 'IV. That it is desirable that this assimilation and improvement should be brought about by a general revision, amendment, and consolidation of the different branches of the Mercantile Law taken successively; but that while these larger measures are proceeding, much immediate relief might be afforded by a series of single Acts addressed to the more pressing and grievous evils; which Acts, by proper arrangements, might be made subservient to the ultimate object.'

"Moved by John Dillon, Esq. (Morrison, Dillon, & Co., London), seconded by S. T. Hassell, Esq., President of the Chamber of Commerce (Hull).

" 'V. That while this work is going forward, it is important that no new measures of Mercantile Law should be introduced into Parliament, but such as may apply generally to the Three Kingdoms, or serve as steps towards a general assimilation.'

"Moved by the Right Hon. the Earl of Harrowby, seconded by William Brown, Esq., M.P. (South Lancashire).

" 'VI. That a Commission, consisting of members of both Houses of Parliament and members of the Legal and Commercial Professions, appears the most efficient means of obtaining the desired results.'

"Moved by Charles Cowan, Esq. M.P. (Edinburgh), seconded by Christian Allhusen, Esq. (Newcastle).

" 'VII. That the President, Vice-Presidents, and Council of the Law Amendment Society, and the following gentlemen—Lord Wharnccliffe, Lord Ashburton, Lord Monteagle, Lord Goderich, M.P.; the Right Hon. M. T. Baines, M.P.; the Hon. Arthur Kinnaid, M.P.; Mr. Dillon; Mr. Bethell, Q. C., M.P.; Mr. Thomson Hankey, Mr. W. S. Lindsay, Mr. T. B. Horsfall, M.P.; Mr. Cobden, M.P.; Mr. Turner, M.P.; Mr. Hastie, M.P.; Mr. Massey, M.P.; Mr. Lavie, Mr. Alderman Copeland, Mr. Leone Levi, Mr. Alderman

Thompson, M.P.; Mr. Slater, Mr. Kennedy, M.P.; Mr. Cairns, M.P.; Mr. Headlam, M.P.; Sir George Goodman, M.P.; Mr. Cowan, M.P.; Sir A. E. Cockburn, M.P.; Mr. W. Hutt, M.P.; Mr. Crossley, M.P.; with power to add to their number—be appointed a Committee to represent the views of this Conference to Her Majesty's Government, and to take such other measures as may from time to time appear necessary for carrying these views into effect.'

"Moved by William Hutt, Esq., M.P., seconded by Mr. Morgan, Town Clerk (Birmingham).

" 'VIII. That this Meeting recognises with pleasure and approval the efforts which have been made by other bodies besides the Law Amendment Society for the assimilation and improvement of the Mercantile Laws of the Three Kingdoms, but would suggest for the consideration of these bodies, whether their future efforts would not be more efficient if made in connexion with those of the above-mentioned Committee.'

"Moved by William Ewart, Esq., M.P., seconded by Robert Ingham, Esq., M.P.

" 'Thanks to chairman.' "

The proceedings of Monday, the 15th November, 1852, are abridged from the reports in the daily prints, and were as follows :—

"A conference of deputations of Town Councillors, Chambers of Commerce, and other public bodies, has been held in London during the past month, for the purpose of promoting the assimilation of the Commercial Laws of the United Kingdom. The conference was held at the rooms of the Society for Promoting the Amendment of the Law, 21. Regent Street. On the evening of Monday 15th November, Lord Brougham, the noble President of the Society, the Earl of Harrowby, James Stewart, Esq., William Hawes, Esq., and several other members of the Council, attended at seven o'clock, for the purpose of receiving the various deputies, and arranging the plan of proceeding to be adopted in the Conference.

"The following are the deputations from Chambers of Commerce and other public bodies :—

AylesburyJohn Lee, Esq., D.C.L.
BathThomas Phinn, Esq., M.P.

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| Belfast | Hugh Cairns, Esq., M.P. | } Chamber of Commerce. |
| " | R. Davison, Esq., M.P. | |
| Birmingham | The Mayor | } Town Council. |
| " | Mr. Alderman Baldwin | |
| " | Mr. Alderman Lucy | |
| " | Councillor Elkington | } Appointed by a Public Meeting held for the purpose. |
| " | G. Shaw, Esq. | |
| " | J. Radcliffe, Esq. | |
| " | Joseph Sturge, Esq. | |
| " | William Middemore, Esq. | |
| " | T. Short, Esq. | } Chamber of Commerce. |
| Bradford | R. Milligan, Esq., M.P. | |
| " | M. W. Wickham, Esq., M.P. | |
| " | William Rand, Esq., President | |
| " | The Mayor | } Chamber of Commerce. |
| " | John Darlington, Esq. | |
| Cork | Mr. Sergeant Murphy, M.P. ... | } Chamber of Commerce. |
| " | William Fagan, Esq., M.P. ... | |
| Dover | J. Poulter, Esq. | } Chamber of Commerce. |
| " | R. Rees, Esq. | |
| " | W. H. Payne, Esq. | Town Council. |
| Dublin | Edward Barrington, Esq. | } Statistical Society. |
| " | J. W. Marland, Esq. | |
| Edinburgh | Right Hon. T. B. Macaulay, M.P. | } Edinburgh Committee for the amendment and consolidation of the commercial law and Chamber of Commerce. |
| " | Charles Cowan, Esq., M.P. ... | |
| " | T. S. More, Advocate (Professor of Law, University) | |
| Gateshead | William Hutt, Esq., M.P. | } Town Council. |
| Glasgow | Baillie Gourlay. | |
| " | R. Jameson, Esq. | } Chamber of Commerce. |
| " | Hugh Cogan, Esq., President. | |
| " | Sir James Anderson, M.P. ... | } Faculty of Procurators. |
| " | A. Morrison, Esq., (Dean) | |
| " | J. Hannan, Esq., Lord Dean of Guild | } Merchant's House. |
| " | Alexander Hastie, Esq., M.P. | |
| " | Andrew Bannatyne, Esq., Writer ... | } Law Amendment Society. |
| " | Robert Baird, Esq., Writer ... | |
| Halifax | Right Hon. Sir Charles Wood, M.P. | } Town Council. |
| " | Frank Crossley, Esq., M.P. ... | |
| Hull | S. T. Hassell, Esq., President ... | Chamber of Commerce. |
| " | John Foster, Esq., President ... | Guardian Society. |
| Liverpool | T. B. Horsfall, Esq., M.P. ... | } Chamber of Commerce. |
| " | Charles Turner, Esq., M.P. ... | |
| " | Charles Holland, Esq. | |
| " | Edward Heath, Esq. | |
| " | W. Lowndes, Esq. | Law Society. |
| Leeds | Right Hon. M. T. Baines, M.P. | } Chamber of Commerce. |
| " | Sir Geo. Goodman, M.P., President | |
| " | C. Bousfield, Esq. | |
| " | F. Wilson, Esq. | |
| London | Germain Lavie, Esq. | } Incorporated Law Society. |
| " | Edward Lawford, Esq. | |
| " | Joseph Maynard, Esq. | |
| " | John Young, Esq. | |

| | | |
|--------------------|---------------------------------|---------------------------|
| Manchester | James Aspinall Turner, Esq., | } Commercial Association. |
| | President..... | |
| " | Malcolm Ross, Esq., Vice- | |
| | President..... | |
| " | H. Ashworth, Esq. | Chamber of Commerce. |
| " | G. Thorley, Esq. | Law Society. |
| Newcastle & Gates- | T. E. Headlam, Esq., M.P. ... | } Commercial Association. |
| head | J. B. Blackett, Esq., M.P. | |
| Nottingham..... | W. Felkin, Esq., Mayor | Town Council. |
| Perth | The Hon. A. Kinnaird, M.P. | |
| Plymouth | J. P. Collyer, Esq., M.P. | |
| Southampton | Sir A. E. Cockburn, M.P..... | } Chamber of Commerce. |
| " | B. Willcox, Esq., M.P..... | |
| " | The Mayor | |
| " | Captain Peacock, R. N..... | |
| " | T. Stebbing, Esq. | } Chamber of Commerce. |
| Worcester | W. H. Kerr, Esq. | |
| " | R. Aldrich, Esq..... | |

The proceedings of Tuesday, the 16th November, 1852, were as follows : —

“ The order of proceeding, the topics to be discussed, and other preliminaries having been settled, Tuesday, the 16th, was appointed for opening the conference, and shortly after 1 o'clock, P.M., on that day, Lord Brougham took the chair, at which time a very large and influential assemblage was gathered together, among whom we noticed the Earl of Harrowby; the Right Hon. M. T. Baines, M.P.; T. E. Headlam, Esq., M.P.; E. H. Crawford, Esq., M.P.; T. B. Horsfall, Esq., M.P.; William Hutt, Esq., M.P.; W. Massey, Esq., M.P.; Edmund Denison, Esq., M.P.; E. Lockhart, Esq., M.P.; Jas. Johnstone, Esq., M.P.; W. Ewart, M.P.; E. C. Egerton, Esq., M.P.; George Carr Glyn, Esq., M.P.; Lord Goderich, M.P.; G. Hadfield, Esq., M.P.; Charles Turner, Esq., M.P.; Mr. Alderman Salomons; James Stewart, Esq.; William Hawes, Esq.; Leone Levi, Esq.; John Dillon, Esq.; Charles Holland, Esq.; Frederick Hill, Esq.; William Brown, Esq., M.P.; Sir George Goodman, M.P.; Hon. A. Kinnaird, M.P.; E. Chadwick, Esq. C. B.; C. H. Cameron, Esq.

“ The Noble Chairman rose and said, — Gentlemen, it gives me very great satisfaction to address this Meeting, not only on account of the high respectability of those who compose it individually, but on account also of those important bodies of our fellow-countrymen who are represented on this occasion. I consider this as a congress of deputies from every important town, both mercantile and manufacturing, of England, Scotland, and, in some degree, of Ireland, for the purpose of taking into consideration one of the most important subjects that can occupy their attention — I mean the

assimilation and improvement of the Mercantile Laws of the land. I consider the Conference now to be holden as important not only for its own objects, and for the good results which I fervently hope will come of it, but also as an indication, leaving, I think, no doubt on the mind of whoever considers it, of a firm determination (if I may so speak) on the part of the people to have their laws improved by all rational, orderly, moderate, and well-considered means. Improved, I say, by persons acquainted with the subject, and not by the ignorant, who are the only parties to raise up a clamour against it — improved by those who will take steps well-advised and rationally considered beforehand — but improved, at the same time, without hesitation and without fear, where their own experience and their own lights clearly show that such improvements are wanted and are safe. Such being, in my opinion, the indications which this Conference gives, my hopes are sanguine as to the results to which it will lead. One has lived a great deal too long to say that anything that has not happened is anything like certain; nevertheless the feeling of the public — I do not say of the multitude, but of the rational portion of the public, — is at the present moment strongly pointing towards the improvement of the law; and I have no manner of doubt that, if those who have commenced this movement, both in and out of Parliament, will unite in carrying forward this desirable — I may add, necessary object, I have no doubt before long good fruit will be borne from their exertions. It is now my duty to call your attention, in the first place, to the constitution of this Meeting, and in the next place to the business before it, although I need not enlarge upon the latter, as it will come on before you in the regular order of discussion. It therefore only remains for me now to state to you what the composition of this Meeting is, because, although each deputation may be aware of what is going on in its own circle, they are not probably aware of the other deputations which have joined in this movement. Allow me, then, to state to you that Edinburgh is not only represented here by its two members, Mr. Macaulay¹ and Mr. Cowan, but it was intended that Professor More should have

¹ Mr. Macaulay was not present on account of the state of his health, but he wrote as follows to the Treasurer:

"The object which you have in view is excellent; and I shall be truly glad to assist you by my vote and by such influence as I possess. But I am afraid that, for some time to come, I shall not be capable of rendering you any service which requires much exertion in the way of speaking."—*Ed.*

accompanied them; but I regret that the professional duties of that distinguished man have prevented his attendance as was anticipated. (Here his Lordship read the names of the deputies.) Besides all these, we have had communications from Paisley; Blackburn, Berwick, Greenock and Aberdeen, approving of the objects of the Conference. I have already stated that I shall leave it to others to bring before you the particular mode in which they deem it expedient to propose to you to carry out the great objects of this Meeting. I am sorry to say that we are likely to be deprived of the presence of several who intended; and who, I know, have been anxious to come. Among others is the Lord Mayor, who has written to say how sorry he is that he is prevented by accidental circumstances, and particularly by the province of his engagements, owing to the unhappy event which has occupied so much men's minds and time. My noble friend, Lord John Russell, also intended to have been present, although he states, with his characteristic candour, that he is afraid he shall not be able to work effectually with us; and Sir Alexander Cockburn is also amongst the number of those whose unavoidable absence I regret. I ought to have stated that Lord Monteagle is most anxious to co-operate with us, and we may have the pleasure of seeing his Lordship here before the close of the proceedings. I have also received a letter from the American Minister, stating his intention, if possible, to be present.

"The Right Hon. M. T. Baines, M.P. for Leeds, rose, and said he had the honour to appear before his Lordship and the Meeting as the humble representative of the highly important manufacturing and commercial community of Leeds, and also as having been deputed by the Chamber of Commerce of that borough to express their opinions on the subject that had brought them together; and he must be allowed to say that, in giving their opinions, they entirely coincided with his own. They even had objects which they had specially in view in that Conference:—the first was to declare that the assimilation of the commercial laws of the three kingdoms was in itself an object of great importance, and one for the attainment of which they should use their best exertions. And certainly when anybody looked at the discrepancy which now existed in the commercial laws, he agreed that they were not raising their voices against this state of things until the proper time had arrived. With regard to Ireland and England, he believed he might say the discrepancy in their commercial laws was comparatively immaterial. With re-

gard, however, to Scotland and England, the case was widely different ; and he would take the liberty of just mentioning some of the points in which the difference existed, which had been brought under his notice whilst he was a member of the legal profession, and yet more by communications from his constituents. When anybody considered the intercourse between Scotland and England, the great multiplicity of commercial transactions which existed, and the greater number that would exist under a different state of things, such a state of difference unquestionably ought not to continue between two members of one and the same great empire. It would hardly be believed by those who had not looked into the matter, that there was so much discrepancy in the commercial laws of England and Scotland. These existed in the law relating to the sale of goods ; to the time and manner of paying for goods purchased ; to the manner in which the sale itself was to be evidenced in a court of justice ; to the warranty of the sale of goods ; to the question of lien ; to stoppage *in transitu* ; to partnerships ; to the Statute of Limitations ; to the disposition of bills of exchange ; and to bankruptcy and insolvency in an eminent degree : in fact with regard to almost all the rendering of the laws between debtor and creditor, the present state of things introduced into the commercial transactions between England and Scotland an element of uncertainty, which must have a most mischievous effect upon commerce. It created unnecessary expense. The English merchant trading with Scotland found himself involved in litigation, from ignorance of the law of Scotland ; and if he applied to his professional man, it was more than probable that he too knew nothing about it, nor could it be expected that he should know. Then there was the element of expense, which pressed heavily upon existing commercial transactions between the two countries ; and he thought it could not be denied that such a state of things had a tendency to narrow the amount of the transactions, and prevent many that would otherwise take place ; so that he apprehended the present state of things was both burdensome and restrictive upon commerce ; and if that were so, it was clear it ought no longer to exist. They had present among them that day, as they had just heard enumerated by his Lordship, those who were best qualified, from the result of their own experience and of those around them, to inform the meeting on this important subject. There were gentlemen present from the various law societies in England, Ireland, and Scotland ; there were representatives of the

commercial bodies in London, Liverpool, Manchester, Leeds, Bradford, Southampton, Hull and Worcester; from Scotland they had the commercial representatives of Edinburgh, Glasgow, Aberdeen, Dundee, and Perth; and from Ireland, those of Dublin, Cork, and Belfast. And was it possible to unite a body of testimony more overpowering than was constituted by those who had so assembled? There was another point on which his constituents felt deeply—that was the necessity of having some better and more orderly system of laws to which they could look, than that which now existed. When they considered the sources from which any one had to derive his knowledge of the law, he thought everybody must see there was the greatest room for improvement. In this country the laws relating to commerce had to be sought for, first, in a variety of unconnected statutes, arranged with no regard to order or method, and scattered over the surface of some thirty-eight formidable quarto volumes. They had then some hundred volumes of reported cases, all depending for their authority upon the character and standing of the party who wrote them, and not upon public sanction. That was a state of things that ought not to exist, particularly when they saw that in other countries they had been able to apply a remedy. He apprehended, seeing what had been done in almost every part of continental Europe and in the States of America, it was quite practicable for them to form a well-considered and well-digested system of commercial laws—call it a code or digest as they chose—coming within a narrow compass, which would be productive of the greatest benefit to the community at large. It could not but be useful to the judge, to the lawyer, who had to advise upon it, and to the mercantile world in general. Those were the grounds upon which his constituents felt a most anxious interest in the success of this Conference. The Right Hon. Gentleman then moved the following resolution:—

“ ‘That the mercantile laws of England, Ireland, and Scotland are scattered and disconnected, and in many instances dissimilar and even antagonistic; a state of things tending greatly to restrict and embarrass commerce, by producing uncertainty, perplexity, and delay.’ ”

“ Charles Turner, Esq., M.P. for Liverpool, said he had been requested to second the resolution, which had been so ably introduced by his right hon. friend; and although he had not come prepared with a speech, he had no hesitation in doing so, because he felt he was acting in the discharge of his duty to his constituents—

(Liverpool)—in endeavouring to remedy a state of things which, as stated in the resolution, had a tendency to restrict and embarrass the commerce of the country. The legal part of the subject had been well treated by the right hon. mover of the resolution; and as regarded the practical part of it, the resolution affirmed that which was so well known to all present, and the inconvenience arising from the present system was so universally acknowledged, not only by every one connected with trade, but also by those who were in the habit of having intercourse with those who were engaged in trade, that they must be alive to the evils arising out of the existing state of things. It caused not only the greatest embarrassment to every gentleman in trade, but they had to seek the protection of the laws of a country in which they did not live, and of which they were in a great measure ignorant. He thought very few of them who had a debt owing them would be inclined to pursue the investigation of it in Scotland; but would much rather, if the amount were not very serious, give up the claim altogether, than expose themselves to the risk, the expense, and the delay of an investigation in the Law Courts of Scotland. It was not for him to say that the Law in England was better than that in Scotland; but there was the fact that the law of each was dissimilar to the other, and it was impossible for their own legal gentlemen, whose opinion they were in the habit of consulting, to advise upon it; the attorney himself must consult some one in Scotland, and the client was at the mercy of a person whom he knew nothing about. He apprehended there was great evil from a dissimilarity in the laws of the colonies of an empire and those of the mother country; but that such a state of things should exist between three portions of the same empire, which were within a few hours' distance from each other, and communication with which could be made in a few seconds, was in his opinion a disgrace to this great commercial country; and he had no doubt it would induce the Legislature to offer the remedy they sought. He had great pleasure in seconding the resolution.

“George Hadfield, Esq., M. P. (Sheffield), begged to inquire the extent of the subjects to be embraced in this Conference. At present one of the great evils in the existing state of the Law was, with regard to the disposition of personal property—an evil which was felt by every family in the kingdom. In a case in which he was personally interested, four probates of will had to be taken out; two in England, one in Scotland, and one in Ireland. The party who benefited by the testamentary disposition died a few

years after, and the whole of that tedious and expensive process had to be repeated. He believed he might say in one form or other, in cases in which he had been personally or professionally concerned, he had had to pay for this monster mischief many thousands of pounds. Why should not one probate be sufficient for the whole of the United Kingdom? for so long as the proper amount of duty upon testamentary dispositions was paid, the justice of the case was met. All that the law of a state ought to require was, that the duty which the law imposed should be paid; and that having been done, every facility ought to be afforded to the executors of the testators, to do their duty faithfully and well. The present state of the law, however, was such as to deter men from undertaking the arduous duties of executors. He therefore thought the resolution ought to embrace the important subject to which he had referred. As he had already remarked, it was a subject in which every family in the kingdom was interested. It applied to 800,000,000*l.* of funded property, to 200,000,000*l.* of railway property, together with many millions of personal property otherwise invested. He therefore hoped the subject would be carefully considered by the committee which it was proposed to appoint that day.

“The noble Chairman said nothing could be more important than the suggestion of the hon. gentleman, and was useful as an illustration of the soundness of the view taken by the resolution which had just been moved. But if they were to enter into all the illustrations that could be given, he (Lord Brougham) should be able to detain them himself till twelve o'clock at night, by mentioning the thousand and one changes of the law which ought to be made with a view to its improvement. The course they had now to take was, not to dwell upon any specific measures, however salutary they might be, but rather to go upon the general object in view, to put measures in a train to give them a reasonable expectation of these salutary measures being detailed properly, and ultimately carried out.

“His Lordship then put the resolution, which was unanimously adopted.

“T. E. Headlam, Esq., M.P. (Newcastle), said he attended the meeting as an humble member of the Society for Promoting the Amendment of the Law, and also as the representative of the Commercial Association of the town of Newcastle, to express entire sympathy in the objects of the Conference, and also their earnest hope that before long it would be the means of providing some

remedy for the evils complained of. They in the North, perhaps, felt these evils more strongly than the community at large: they felt the pressure very greatly. They were not strictly a border country; but in these modern times they felt the evils arising not merely from the uncertain administration of the law, but also from the difficulties which prevailed in the law itself. Of course, in a town like Newcastle, their transactions were of considerable magnitude, and the facilities of locomotion were every day extending the amount of them, and the evils arising from the present dissimilarity of the laws were proportionately increased. He had been requested to submit the next resolution, which was as follows:—

“ ‘That it is highly desirable that a well-digested and well-arranged body of mercantile laws should be framed and established for the whole of the three kingdoms.’ ”

The hon. gentleman proceeded to remark that independently of any question with respect to the assimilation of the law in different parts of the kingdom, the resolution would be applicable to that limited portion of it, England; because the mercantile law was not to be found in any better-arranged or more intelligible form. They must search through volumes of statute law which were couched in such obscure language that even legal men often found it very difficult to understand them, whilst the purely mercantile man could not hope to reconcile the apparent inconsistencies or disentangle the mass of difficulties that existed. But when they had gone through the statutes a great portion of the mercantile law had still to be elicited from the cases decided by the eminent judges; but at the same time, although it was far from him to throw the slightest doubt upon the value of these laws, it must be admitted that they are found in a shape most inconvenient to the commercial world at large. But what they wanted was, that when the law was established, it should be arranged in a shape that was accessible to the community, and, what was most important, that it should be expressed in clear and intelligible language. With respect to the Court of Chancery, few persons understood its proceedings; and the result had been that they had gone on for a great length of time without the benefit that was to be derived by the community by impressing upon them the most valuable precepts of Equity; but something had been done in that quarter, and they might now hope to see the Court of Chancery recognised as one of the most valuable tribunals in the country. These remarks applied most strongly to the law regulating real estate: at present it was the terror of those whose property was subject to its provi-

sions; and he would say the mere circumstance of it not being understood was in itself a great evil. The hon. gentleman who spoke last had pointed out the difficulty of proving wills under the present state of the law. It was most marvellous that in 1852 they should still be subject to the jurisdiction of he knew not how many petty Ecclesiastical Courts, having a very limited jurisdiction; and the doubts rising out of the conflicts in these Courts were known to almost every one. But he knew of nothing so likely to put an end to these evils as a meeting like the present, not only of those who were conversant with the law, but of those also who had suffered from the existing state of things. Therefore he congratulated the Meeting upon the numbers and respectability of those who had come forward to take part in the carrying of this great work into execution; and he trusted before long the Legislature would have some good work to perform in reference to it. He had great pleasure in moving the adoption of the resolution which he had read.

“ Germain Lavie, Esq. (Incorporated Law Society of London), seconded the resolution. He said it was impossible the Society which he had the honour to represent on that occasion should not feel a deep interest in this important movement: and with that feeling they had deputed him to attend the Conference to express their great desire that the resolutions to be that day submitted should be carried through, and their readiness to assist in any way in their power towards the proper working of those measures. At the same time, he was bound to state that the Society he represented entertained doubts of the practicability of any universal Code. They thought it would involve a great consumption of time, and that great difficulties stood in the way of regulating laws now so essentially different from each other; and they wished to guard themselves against a concurrence in the opinion that such a measure was practicable; but he thought great good would result from attempting the practicability, and bringing about certain assimilations, which would be very valuable. Upon another point the Incorporated Law Society differed, no doubt, from most present. They clung with something like respect to the Common Law of England; and they thought it impossible to form any code of laws that should be so elastic as not to give rise to litigation greater than was now attempted to be remedied. They all felt the necessity for the consolidation of the Statute Law, the Bankruptcy Laws, and anything else independent of the Common Law; but they thought it would be difficult to supply a

code of universal laws equal to the present Common Law of the country.

“ The resolution was carried unanimously.

“ W. N. Massey, Esq. M.P. (Newport), said on entering that room he had no idea that he should be called upon to take a part in these important proceedings ; but, as an humble member of the Association for the Amendment of the Law, in whose labours he had participated for some time with pride and satisfaction, he had great pleasure in moving the next resolution. He thought that Association, under the guidance of the noble and learned Lord in the chair, was more likely to advance the cause of Law Reform than any other association that had ever met for the advancement of any particular object. It would be unbecoming in him to preface the resolution with any lengthened remarks. The resolution spoke for itself, and must command the ready assent of every gentleman who was anxious to promote this excellent cause. It was as follows : —

“ ‘ That, dismissing all local and even national prejudices, the assimilation and improvement of the mercantile laws of the three kingdoms, and the improvement and, where requisite, the assimilation of the procedure, should be effected by selecting those principles and rules, wherever they may be found, which shall be deemed the best and most beneficial to the commercial classes and to the community at large ; and that to this end it is necessary carefully to examine the mercantile laws, and to have recourse to the experience of other countries.’

He apprehended that in this movement they had nothing to fear from local or national prejudices ; the day had gone by when such obstacles existed in the path of legal reform. There were political questions, which divided into parties and which often led to very painful discussions ; but he congratulated his Lordship and the Meeting upon the fact, that the cause of Law Reform was rescued from the distractions of party politics. He might say that less than a century ago the Common Law of this country was mere chaos, and was first brought into shape by that great genius, Earl Mansfield ; since then, the work had been fostered by the labours of the most eminent judges, whilst the development of the moral law in the Courts of Westminster had been greatly assisted by the labours of the Legislature, but no compendious or statesmanlike view had been taken of the entire subject of the laws affecting the commerce of this country. And it was some-

what singular, that whilst they had always stood unrivalled in the world as a commercial country, they had advanced to the present age without having made any effort to improve the laws by which commerce was regulated. He might advert to a subject of immense importance, viz. the circulating medium of the commercial world in the shape of bills of exchange. It did seem to him that all the questions which had arisen, and which filled the books of the reports of the Common Law Courts, with regard to what was the fit method of presenting bills of exchange, ought never to have been a subject of discussion in the Courts of Westminster. They were pure matters of business; and men of business, not Courts of Law, should have had the seizin of that question. Grateful as he individually felt to the Legislature for the advances that had been made in ridding Courts of Justice from much of the foul slander that attached to them, he thought there was still work to be done in that extensive field of labour.

“ Alexander Hastie, Esq., M.P. (Glasgow), said he had great pleasure in seconding the resolution, as it afforded him an opportunity of expressing his concurrence in the objects of this Conference. He might, however, state that many persons in Scotland were in fear that, from the greater legislative power and importance of England, the Scotch Law would be swallowed up by that of England. For his own part, he felt no apprehension on that ground, for he was sure their wish would be to adopt that which was best in the laws of both countries. In the Bankruptcy, especially, he wished to see an assimilation of the laws of Scotland with those of England, and he also desired to see the jurisdiction of the County Courts in Scotland extended to an amount equal to those in England.

“ William Lowndes, Esq. (of Liverpool), referred to the mode of procedure by foreign attachment, and expressed a hope that if retained in Scotland, as it was by local customs in London, Bristol, and Exeter, it might be extended over the whole country. He trusted, also, that the English Law, with respect to the warranty of a title to sell goods, might be assimilated to the Scottish Law in this respect, which was the law of common sense. Moreover, he thought that the example of the Scotch Law might be followed with advantage in respect to the part ownership of ships, seeing that, if the part owners could not agree, a sale might be compelled by the minority.

“ The noble Chairman interrupted with the suggestion that the

hon. gentleman's remarks were matters of detail which it was not competent for the present Conference to entertain.

"James Aspinall Turner, Esq., President of the Manchester Commercial Association, said he was not prepared to enter into explanations of particular points in which assimilation of the laws was required; but, coming as he did from Manchester, he wished to express the concurrence of the people of that city in the objects of this meeting. Coming from a town which had always stood forward to attempt to remove the shackles from commerce, they, of course, supported an association whose object was to remove the difficulties in the law which had come under its observation. They wanted a law which, in cases of bankruptcy, would effect a speedy and satisfactory settlement of affairs; but the Law, as it stood now, was a shackle upon and an impediment to commerce. There was one other point on which he begged to express the concurrence of his fellow-citizens, viz. that they should inquire into the working of the systems of foreign countries, and examine foreign codes, in order that they might avail themselves of any enlightenment that might be obtained from them. The principle of the men of Manchester was, that what was good from foreign countries should be imported and made available for the good of the community at large.

"Lord Brougham—You mean that we ought to take a leaf out of their book.

"The resolution was then unanimously approved.

"Robert Baird, Esq., writer, of Glasgow, rose to move the fourth resolution, and said he felt he should best consult the position he occupied and the feeling of the meeting, as well as show his sense of the mature consideration which this series of resolutions had received, by compressing his remarks into a very few observations in introducing the resolution which had been entrusted to him. Nothing was necessary to be said by him to prove the desirability of assimilating the commercial laws of the United Kingdom. Doubts might be entertained of the practicability of the measure; but, with the utmost respect for those who entertained that opinion, he (Mr. Baird) must be allowed to say that the impracticability did not appear to those who had given great attention to the subject. The resolution he had to submit was as follows:—

" 'That it is desirable that this assimilation and improvement should be brought about by a general revision, amendment, and consolidation of the different branches of the Mercantile

Law taken successively ; but that while these larger measures are proceeding, much immediate relief might be afforded by a series of single acts addressed to the more pressing and grievous evils ; which acts, by proper arrangements, might be made subservient to the ultimate object.'

The concluding paragraph of that resolution (continued Mr. Baird) must tend to calm the apprehensions of those who considered there were some grievances more prominent than others, which required more immediate redress, inasmuch as they would see there was no intention by this resolution to shelve—if he might be allowed the expression—any measures of immediate local requirement ; and he hailed with pleasure the distinct announcement of the former portion of the resolution. The doubts as to the practicability of the measure came from men whose experience entitled their suggestions to the highest respect ; but for his own part he was happy to say that the most eminent lawyers in his native city had entertained no such doubts. The noble and learned Lord in the chair had alluded in terms of regret to the absence of Professor More ; but it afforded him (Mr. Baird) great pleasure to state that that distinguished man had committed himself to the great work they had in hand. In a letter to Mr. Leone Levi, the Professor said :

“ 19 Great King Street, July 12. 1852.

“ ‘DEAR SIR,—I do not anticipate any great difficulty in preparing a Code of Commercial Law for the United Kingdom, and which might be adopted by every country of the world. The general principles of Commercial Law, depending entirely on the rules of natural equity, must be substantially the same in every country, and the slight discrepancies or variations which accident or some adventitious circumstances have introduced into different codes, might, with manifest advantage, be so reconciled and adjusted, as to produce that harmony and agreement which would be so beneficial to commerce, and to the interests of all mercantile men. I think, I told you, long ago, that the adoption of such a general code would only be a return to that *Law Merchant*, as the older English jurists used to term it, which they held to be a branch of the *Law of Nations*.

“ ‘I hail, therefore, the preparation of your projected Code of Commerce, as one of the most important works which it is possible to undertake, and I shall be happy to render you any assistance in my power in the preparation of this work.

“ ‘I am very faithfully yours,

“ ‘J. S. MORE.’

"From this it would appear (added Mr. Baird) that the laws were gradually codifying themselves. He then referred to the opinion expressed by that eminent jurist, the late much lamented Mr. James Reddie, Advocate, and read the following passage out of a printed letter, addressed by that gentleman to James A. Anderson, Esq., banker of Glasgow:—'For these reasons, I would humbly recommend the suggestion to the illustrious personages who patronise Mr. Levi and support his plan, which is certainly very desirable, not only to apply to the government of this country to exert its influence with the governments of other nations, to induce them to concur in the recognition and establishment of a universal Commercial Code, but also to use their influence with the government of this country, and her Majesty's ministers, and with Parliament, that a royal commission may be issued to a small number of individuals, highly qualified for the due and efficient execution of the task, to digest into a systematic report, or reports, the Maritime and Commercial Law of England and of Scotland, embracing of course the statutes now in force applicable to Great Britain, and also the common consuetudinary law of England and of Scotland, comprehending the principles and detailed rules established by the judgments of the English and Scotch Courts and by established usage; the said report to be afterwards laid before Parliament, and to be sanctioned by the British Legislature. The commissioners to be nominated, might perhaps be composed partly of lawyers, partly of merchants, bankers and manufacturers, but both distinguished by their high and appropriate talents, and by their learning and practical ability, and skill, from experience.' He concluded by moving the resolution.

"Wm. Rand, Esq., President of the Bradford Chamber of Commerce, seconded the resolution, and expressed the concurrence of the people of that town in the objects of the Law Amendment Society, and also their conviction that in a country which possessed a large international commerce there ought to be cheap law as well as cheap food.

"The resolution being put from the chair, was carried unanimously.

"John Dillon, Esq. (Morrison, Dillon, & Co., London), said he was able to bear testimony, partly from his own experience in trade, but more from the experience of those with whom he had been in intercourse, to the practical inconvenience of a different system of laws in different parts of the same country. The case hardly required an argument to prove it. Must it not, he would ask, be

highly inconvenient to the trader, when in the same country the laws regulating the sale of goods and the carriage of goods were dissimilar—the laws regulating payment different—and, more especially, the laws relating to bankruptcy and insolvency different? Some time since, a plan emanated from this Society—which was very much approved of by the public at the time—for the assimilation of the Commercial Laws of all countries; but might it not have been justly said to those who suggested the plan, that they ought to look at home first? Were they to undertake a universal Code of Commercial Law, when the narrow severance of the Tweed made so essential a difference in the Laws of Commerce? Whatever might have been the case when the means of intercourse were tedious and uncertain, and the trade in a great measure internal, if it was then tolerated that the laws in England and Scotland should be dissimilar, it was clear that state of things could be no longer borne, now that they were, as regarded trade, no longer English, Scotch, or Irish, but must consider themselves in every respect as one people. He (Mr. Dillon) would only add thus much:—he was persuaded their friends in the North were mistaken if they thought there was any prejudice in the metropolis in favour of the English Law as a whole, or that there was any intention or wish to enforce their views and practices. For his own part he was ready to admit, from his own experience, that there were many practical points in the Scotch Law superior to their own—as, for instance, as regarded bills of exchange, the law of sale and payment, and on most general questions of the day. They might look upon the gentlemen of Scotland as having set an example worthy of imitation, like that of the system of County Courts which had been followed in England. Mr. Dillon then moved the following resolution:—

“That while this work is going forward, it is important that no new measures of Mercantile Law should be introduced into Parliament, but such as may apply generally to the three kingdoms, or serve as steps towards a general assimilation.”

“S. T. Hassell, Esq., President of the Hull Chamber of Commerce, seconded the resolution, and said he addressed the meeting as a practical merchant, and he congratulated them upon the assembling of the first mercantile parliament, that had ever been convened in the metropolis; such a meeting, he added, would not have been held were it not for the universal impression that prevailed throughout the country that the Commercial Laws required

amendment, and in fact remodelling. He had had some experience in the Mercantile Laws of Russia, Prussia, Sweden, and some of the British Colonies ; and he could say as regarded Russia, that in a transaction in Finland, in which he was concerned, the expenses were so trifling that he thought some mistake had been made. With respect to the Scotch Law, there were words as unintelligible to our English lawyers as Chinese.

“ The resolution was then adopted.

“ The Earl of Harrowby said—After the able addresses they had heard from practical men and those learned in the Law, he had but slight pretensions for offering himself to the notice of the meeting. The only excuse he could urge, was his long connection with Liverpool and a general interest in the commercial affairs of the country, which had given him an opportunity of seeing the importance of simplifying, as much as possible, the laws relating to mercantile transactions. There had been many cases through his own hands which had proved to him the want of that simplification ; and from what he had heard that day, he was more than ever convinced of the importance that such a system of laws should be as widely extended and as closely assimilated as possible. The resolution he had to propose was as follows : —

“ ‘ That a Commission, consisting of members of both Houses of Parliament and members of the legal and commercial professions, appears the most efficient means of obtaining the desired results.’

“ Now (continued his Lordship) if it were proposed to have a commission constituted as was often the case in olden times, he would hardly hope to carry the sanction of the present meeting ; because there might be a feeling that the lawyers were not the best persons to choose to reform their own practice. People, they knew, were in the habit of walking in certain ruts which they could not get out of, and became associated with technicalities which it required expanded qualities of the mind to emancipate themselves from ; and he (Lord Harrowby) need not fear that remark in the presence of the Noble and Learned Lord in the Chair, inasmuch as his Lordship had shown himself foremost in his exertions to bring about wise and salutary reforms in the laws of the country. If such a commission as was now proposed were appointed, there might still be some jealousy on the part of the people of Ireland and Scotland, that the eloquence of the English lawyers might prevail, and that they would give undue preference to the code in

which they had been educated : but he (Lord Harrowby) believed that the English merchants had no particular preference to the English Law, but were anxious for those regulations, wherever they were taken from, which would best conduce to the general interest, and therefore there was no temptation on the part of English laymen to seek for an assimilation in conformity with the English canon. They had struggled for a long time against abuses and evils in the Court of Chancery ; and he recollected making the remark that the English law was a thing that none but lawyers could reform, and they would not do it. But he ought to apologise now for the expression of that opinion, for they now saw the lawyers of England were ready to join in the work of legal reform. He should not feel the interest he did in the present movement, did he not think it would prove a stepping-stone to something else. There could be no doubt before long there would be a continuous communication by means of the electric telegraph, not only with every part of the United Kingdom, but also with the whole continent of Europe ; and if they set the example of a sound code of commercial laws for the whole kingdom, it might not be too much to expect that it would be adopted by other countries. As regarded America, there was no national jealousy which restrained them from adopting such English laws as were found suitable to their circumstances, and they were too proud to acknowledge their origin ; and if they established a good sound English code, stripped of all useless technicality, he saw no reason why it should not be adopted in the same manner as the Justinian Code was adopted by almost every other nation. Before he sat down he would express his deep acknowledgments to Mr. Leone Levi for his eminent services towards this great movement. The greatest amount of credit was due to that gentleman, who came amongst them a young man and a foreigner, and who had brought to bear upon the subject an immense amount of intelligence and research. He was richly entitled to their thanks, having, as he (Lord Harrowby) believed, kindled a flame, not for destruction, but for the improvement of those commercial regulations upon which they hoped to carry on their future transactions.

“ William Brown, Esq., M.P., seconded the resolution, expressing his concurrence in the objects for which they had met ; and the same was carried without a dissident.

“ The Noble Chairman said he had communicated with the Noble Lord at the head of her Majesty's Government that in all proba-

bility the present Conference would result in a deputation to his Lordship, and begging him to name the earliest opportunity on which it would suit his Lordship's convenience to receive them. His Lordship had kindly communicated his willingness to receive a deputation on the following afternoon.

"Charles Cowan, Esq., M.P., Edinburgh, moved the following resolution : —

"That the President, Vice-Presidents, and Council of the Law Amendment Society, and the following gentlemen, viz. — Lord Wharnccliffe, Lord Ashburton, Lord Monteagle, Lord Goderich, the Right Hon. T. Baines, M.P.; the Hon. A. Kinnaid; Mr. Dillon; Mr. Bethell, M.P.; Mr. Hankey; Mr. Lindsay; Mr. Horsfall, M.P.; Mr. Cobden, M.P.; Mr. Turner, M.P.; Mr. Hastie, M.P.; Mr. Massey, M.P.; Mr. Lavie; Mr. Alderman Copeland, M.P.; Mr. Leone Levi; Mr. Alderman Thompson, M.P.; Mr. Slater; Mr. Kennedy, M.P.; Mr. Cairns, M.P.; Mr. Headlam, M.P.; Sir George Goodman, M.P.; Mr. Cowan, M.P.; Sir A. E. Cockburn, M.P.; Mr. W. Hutt, M.P., and Mr. Crossley, M.P., with power to add to their number — be appointed a Committee to represent the views of this Conference to her Majesty's Government, and to take such other measures as may from time to time appear necessary for carrying these views into effect.'

"This was seconded by Mr. Allhusen, of Newcastle, and unanimously approved.

"William Hutt, Esq., M.P., moved the next resolution : —

"That this Meeting recognises with pleasure and approval the efforts which have been made by other bodies besides the Law Amendment Society, for the assimilation and improvement of the mercantile laws of the three kingdoms; but would suggest, for the consideration of these bodies, whether their future efforts would not be more efficient if made in connection with those of the above-mentioned Committee.'

"John Morgan, Esq. (town-clerk of Birmingham, in the absence of the mayor of that town, through unavoidable circumstances,) seconded the motion, which was carried with the same unanimity as characterised the reception of the preceding resolutions.

"Francis Lyne, Esq., begged to inquire whether this Conference intended to embrace the important subject of the establishment of

local tribunals of commerce — a subject, he said, which had been taken up with great interest in the city of London, where a committee had been formed, including the names (as we understood) of twenty-two members of parliament.

“ Lord Brougham replied that any subjects not strictly within the line marked out for that day’s proceedings, could be entertained at the adjourned meeting on the following day.

“ Charles Holland, Esq. (Chamber of Commerce, Liverpool), thought the subject referred to of the greatest importance; and he would take the opportunity, if allowed him, to bring it forward at the next sitting of the Conference.

“ Upon the motion of Mr. Ewart, M.P., seconded by Mr. Ing-ham, the cordial thanks of the Meeting were passed by acclamation to the Noble Lord who had presided over the business of the day; and the same having been acknowledged, the Meeting adjourned till the following day at 12 o’clock.”

The proceedings of Wednesday, the 17th of November, were as follows :—

“ At three o’clock, P.M., the deputation appointed to represent to her Majesty’s Government the views of the Conference waited upon the Earl of Derby at his Lordship’s official residence in Downing Street. The Earl of Harrowby headed the deputation, which consisted of the following gentlemen :—Messrs. C. Turner, M.P., C. Holland, and C. Heath, Chamber of Commerce, Liverpool; W. Ewart, M.P., Law Amendment Society; J. Mitchell, Chamber of Commerce, Edinburgh; J. Gourlay, Town Council, Glasgow; J. Hannan, Merchants’ House, Glasgow; H. Cogan, Chamber of Commerce, Glasgow; A. Morrison, and R. Jameson, Faculty of Procurators, Glasgow; R. Baird, Law Amendment Society, Glasgow; Hon. A. Kinnaid, M.P., Perth; Sir G. Goodman, Bart., M.P., Leeds Chamber of Commerce; J. Stebbing, W. Lancaster, and J. Peacock, Southampton Chamber of Commerce; H. Aldrich, and W. H. Kerr, Worcester Chamber of Commerce; W. Fagan, M.P., Cork; F. E. Headlam, M.P., and T. Blackett, M.P., Newcastle and Gateshead Commercial Association; J. Poulton, R. Roas, and W. N. Payne, Dover Chamber of Commerce; G. Thornley, Manchester Law Society; Dr. Lee, Aylesbury; Messrs. W. Morgan, J. Ratcliff, and C. W. Elkington, Birmingham; C. Allhusen, Newcastle; John Darlington, and W. Rand, Bradford Chamber of Commerce; H. Ashworth, Manchester Chamber of

Commerce ; J. A. Turner, and M. Ross, Manchester Commercial Association ; B. Oliveira, M.P., R. Ingham, M.P., W. Brown, M.P., W. Frewen, M.P., J. Heywood, M.P., P. Urquhart, M.P., E. Wise, H. Ayres, J. Crawford, E. Aston, S. Ayrton, E. Lee, C. Ratcliff, A. Sperling, and Leone Levi.

"The Earl of Harrowby, in a lucid and comprehensive address, detailed to his Lordship the defects which at present exist in the mercantile laws of the three kingdoms, arising both from the scattered and disconnected state in which they are found, and from the dissimilarity between the law of England, Ireland, and Scotland. He alluded to the character of the Conference, which comprised deputations from every town of importance, and to the united expression of the mercantile and legal classes as to the importance of having a well-digested system of Mercantile Law for the whole of the three kingdoms. His Lordship further alluded to the importance of improving the administration of Mercantile Law by affording means for speedy justice, and also to the extension of the jurisdiction of County Courts into Scotland.

"Mr. Ewart, M.P., bore testimony to the desire which extensively prevails in Scotland, that the mercantile laws of the three kingdoms should be assimilated.

"Mr. Fagan, M.P., concurred on the part of Ireland in all that had been stated with respect to the sister kingdom.

"The Earl of Derby listened with his usual attention and courtesy, and then stated that the subject was unquestionably of great importance, and the attendance of such a number of persons from all parts of the three countries showed the interest the commercial classes took in it ; that he would certainly submit the matter to his colleagues, and give it full consideration ; and that he did not, for his own part, see any insuperable difficulty in the way of such a commission ; but it was a question upon which, without consulting his colleagues, it would be impossible to give a decisive opinion.

"The deputation then retired."

We have reason to believe that the Commission would have been granted by the Government of the Earl of Derby if it had remained in office. The subject of the Conference has been repeatedly alluded to in Parliament, both directly and incidentally, and the benefits to be derived from it are at once so obvious and so attainable as to receive a concurrence almost universal. We believe that the Government of the

Earl of Aberdeen will not be behind that of its predecessors in meeting the wishes of the country, and it is highly probable that they will anticipate any movement on the part of the Society by issuing a Commission. If not, it will be the duty of the Society to call together the Committee appointed under the seventh resolution, and proceed to make the proper representations to the Earl of Aberdeen, and to take such other steps as may be advisable.

Thus then, a most important undertaking has been most auspiciously commenced, and we have no hesitation in saying, that if prudently and cautiously, but boldly and energetically conducted, the object will be shortly accomplished; and the Commercial Law of the three kingdoms will be assimilated and greatly improved.

It is important, however, to keep in view what is attainable and what is not. The mode of safely and successfully conducting any great reform, is to ascertain the time when the country and the general feeling of the classes to be affected are sufficiently well informed to listen willingly to a change. With respect to the legal and commercial classes, and their representatives in Parliament, the Conference has sufficiently established the fact, that so far from being startled or disinclined to an assimilation of Commercial Law, they earnestly desire it on the principles laid down by the resolutions thus unanimously agreed to. But by far the greater number of persons then collected, would have rejected any attempt to assimilate the Commercial Law of Europe, and many would turn from the idea almost with aversion, as a Quixotic and impracticable dream. It should therefore be stated distinctly, that the project of the Law Amendment Society is the assimilation of the Commercial Law of England, Ireland, and Scotland, and it is right, clearly to call attention to this, because this proposal arose from the deliberations of a Committee appointed by that Society to consider the subject of an International Code, as will be seen by one or two brief extracts from the Minutes of that Committee.

“ Minutes of a Meeting of the Committee for promoting the formation of an International Code of Commerce, held in the rooms

of the Society for promoting the Amendment of the Law, on the 16th June, 1851.

"Present:—The Right Hon. the Earl of Harrowby; Mr. Commissioner Fane; Robert Lowe, Esq.; James Stewart, Esq.; William Hawes, Esq.; John Gilmour, Esq. The Right Hon. the Earl of Harrowby in the Chair.

"The Minutes of the last Meeting were read and approved of.

"The chairman stated, that in pursuance of the resolutions of last Meeting, he had communicated with Thomas Baring, Esq. M.P., as to calling a meeting in the City: and that the opinion of Mr. Baring, as well as those of some other gentlemen of mercantile eminence, were, that there is not yet sufficient encouragement to call a public meeting in the City for the purpose of carrying out the object in view.

"The Meeting, on the motion of Mr. Hawes, appointed a Sub-Committee, to draw up a Circular to merchants of foreign countries in order to ascertain in what respect diversities in the commercial laws and customs of different countries, interfere with or obstruct the just settlement of their transactions.

"The Meeting, on the motion of Mr. Stewart, also appointed a Sub-Committee for considering in what respects the law of England and Scotland can be advantageously assimilated, and to report as to the means by which it can be accomplished.

"The two Sub-Committees to consist of the following members of this Committee: The Right Hon. the Earl of Harrowby; Mr. Commissioner Fane; Robert Lowe, Esq.; James Stewart, Esq.; William Hawes, Esq.; Frederic Hill, Esq.; John Gilmour, Esq.; with power to add to their number.

"Minutes of a Meeting of the Committee for promoting the formation of an International Code of Commerce held in the rooms of the Society for promoting the Amendment of the Law, on Wednesday the 9th July, 1851. The Right Hon. the Earl of Harrowby in the Chair.

"The subject of the reference made to a Sub-Committee at last Meeting to ascertain from merchants of foreign countries in what respect diversities in the laws of different countries interfere with or obstruct the just settlement of their transactions, was fully discussed and recommended.

"Mr. Stewart, on the part of the Sub-Committee for considering in what respects the law of England and Scotland can be advantageously assimilated, reported, that the Secretary had prepared a statement of the points in which the laws of the two countries differ

upon the contract of the sale of goods, embracing such additional information as seemed to him necessary for enabling the Committee to form an opinion upon the question whether the English or Scottish rule should be adopted, and under what modifications, as the laws of the United Kingdom. The Meeting refer the statement so prepared to the consideration of the Sub-Committee, and request the Secretary to proceed with similar statements of the other points of difference which exist in other branches of the commercial laws of the two countries."

This, indeed, should be the motto of the Society, to prove all things, and "hold fast that which is good." A true adherence to this rule is all the difference between undertaking the prosecution of an idea which will gain acceptance with all reasonable and right-thinking men, and pursuing a shadow, not only profitless in itself, but which misemploys time and energies, which might otherwise be useful. This distinction seems to have been soon drawn by the Law Amendment Committee.

These resolutions led to the visit to Scotland in the autumn of 1851 by Mr. James Stewart and Mr. Gilmour, of which we have already given some account¹, and to the formation of the Law Amendment Societies of Edinburgh and Glasgow, and meetings in other parts of Scotland, with the express object of assimilating the Commercial Law: and to the letter of the former Society, which led immediately to the late Conference. We shall watch further proceedings on this subject with the greatest interest, nor do we doubt that we shall, probably, before another Number, have satisfactory results to communicate.

ART. XI. — PRACTICAL REFORMS IN CONVEY- ANCING.

NO. II.² — THE INCLOSURE ACTS.

WE have indulged ourselves in much speculation with respect to Conveyancing Reform, as well in this present Number as

¹ See 15 L. R. p. 204. Nov. 1851, Art. "Law Amendment in Scotland," and *ante*, p. 205.

² See 15 L. R. Art. I.

throughout the course of this work; and we shall continue this course, being persuaded that however desirable, changes in the law of property cannot be too much discussed previous to their coming into operation, in order clearly to ascertain their true grounds and correct limits. We wish, however, to pay some attention to the alterations in the law of property which have been recently effected by divers statutes, which will be found to be by no means unimportant or without use, as well in themselves, as helping us to obtain others of a wider scope.¹

General Objects of the Inclosure Acts.—With this view we devoted considerable space to the Act of last Session, which provides for the Compulsory Enfranchisement of Copyholds, and we now propose to bring under the notice of our readers the series of Inclosure Acts, which close with an Act of the same Session², and under which a most useful change has been worked and is working in the rural districts. By means of these Acts land has been drained, planted, and brought into cultivation; churches, schools, and cemeteries have been erected, village greens enlarged and secured; the exercise and recreation of the labouring poor promoted and protected; a large extent of land reclaimed and brought into cultivation, and a great reduction of poor rates effected by the employment of the agricultural population. The inclosures thus effected, while they provide for all public interests connected with the health, comfort, and innocent enjoyment of the poorer classes, add greatly to the true wealth of the country, and are so managed as to benefit all interested, with injury to none. We hold, indeed, this series of legislative improvements to be as valuable as any that this century has produced, not unfertile in useful Acts; and we hope to see the principles and practice which are there established, and the ready dealing with land, extended and brought into wider operation.

Let us then proceed to the consideration of the series of Acts which began with the Act 8 and 9 Vict. cap. c. 118., which Act, according to the practice of modern legislation,

¹ See 15 L. R. 1.

² 15 & 16 Vict. c. 79.

has been added to and amended almost every year¹, ending with that just expired.

Persons who can set the Acts in Operation. — The policy of the Inclosure Acts is to deal with persons in the actual possession of the land, or the interest which is to be the subject of the inclosure, whether it be the interest of the lord of the manor or that of the commoner.

The Act therefore mentions those who are *not* to be deemed parties thus interested, as follows (s. 16.²):

Any tenant for life or lives, or for years, holding under a lease on which a rent of not less than two thirds of the clear yearly value of the premises shall have been reserved, and any tenant for years whatsoever holding under a lease for a term which shall not have exceeded fourteen years from the commencement thereof, and any tenant from year to year, at will or at sufferance.

And when the title to any manor, land, or right to any estate or interest therein, is litigated, of which the actual owner would under the Act be the person interested in land concerning which any application or proceeding may be made under the Act, the consent of both persons between whom such litigation may be pending shall be as effectual as the consent of the actual owner of the manor land or right would have been as if no such litigation had been pending (10 & 11 Vict. c. 111. s. 1.); and where more than one person would be interested, the nonsignification of dissent shall be equivalent to a consent (s. 2.).

Provision is made for representing persons jointly interested (8 & 9 Vict. c. 118. s. 19.); and in case of disability, for substituting by the Commissioners, under their hands and seal, of a proper person to represent the interest (s. 20.).

But if the Commissioners shall see occasion, at any time before certifying the expediency of any inclosure, or determining any claim or matter, or approving any report

¹ 9 & 10 Vict. c. 70.; 10 & 11 Vict. c. 111.; 11 & 12 Vict. c. 99.; 12 & 13 Vict. c. 83.; 15 & 16 Vict. c. 79.

² When only a reference to a section is given, the Act 8 & 9 Vict. c. 118. is referred to.

or award, or in any other stage of the proceedings, they may require notice to be given to the person next in remainder, reversion, or expectancy of an estate of inheritance in any land, or to any other person to whom they think notice should be given, and may determine any objection which may be given by the person so next in remainder, reversion, or expectancy (s. 145.).

Whenever persons interested in any land to be inclosed shall be entitled to any similar rights of common, and it shall appear to the valuer that it would be for the benefit of such persons to be dealt with as a class, the Commissioners may call a meeting of the persons interested, for the purpose of ascertaining whether two-thirds in number of the persons present shall be desirous of being dealt with as a class, and the Commissioners shall, if two-thirds of the persons present desire it, direct that such persons shall be dealt with as a class; and if it shall appear that two-thirds of such persons are desirous of being dealt with as a class, the Commissioners shall so direct it (8 & 9 Vict. c. 118. s. 87.; and 12 & 13 Vict. c. 83. s. 2.).

What may be inclosed. — The “land” (intending by this word its largest legal signification) which may be inclosed under the Act is land which is subject to any rights of common, and whether such rights may be exercised and enjoyed at all times or only during limited times; all gated and stinted pastures in which the property of the soil is or is not in the owners of the cattle-gates, or other gates or stints; all land held in common, either at all times, or during any time or season, and whether the separate parcels shall or shall not be known by metes or bounds, and some other description of land mentioned in the 11th section of the first Act. But no land is now to be inclosed without the previous direction of Parliament, obtained in the manner we shall hereafter mention (s. 12., and 15 & 16 Vict. c. 79. s. 1.).

Great care was taken in the first Inclosure Act to provide against the taking away, by means of inclosure, of the open spaces existing in wastes and commons within certain distances of large towns (s. 14.); but it is no longer necessary to attend to this provision, because by the Act of last Session no inclosure can now be made without the express authority of

Parliament (15 & 16 Vict. c. 79. s. 1.), and the further proceeding with any Act authorising an inclosure may be resisted on this ground.

Village greens are not affected except in cases of inclosure, but provision may be made for preserving the surface and fixing their boundaries (s. 15.); and if the Commissioners shall so direct, they need not be fenced (15 & 16 Vict. c. 79. s. 14.).

How Interest is to be calculated.—Such being the persons whose interests are to be taken into account, and such the subject matter of the inclosure, it is provided by s. 22. that the interest therein shall be estimated by a reference to the poor rate; that is to say, when the interest shall be in respect of land or other rateable property, then according to the proportional sums at which such land or rateable property shall be rated to the relief of the poor where the property is so rated; but when it is not so rated, or where this is impracticable, then the Commissioners may direct in what way such proportional value shall be estimated.

Proceedings in the Inclosure.—Let us now see in what way the inclosure is to be proceeded with.

The persons interested in the land to be inclosed are to apply to the Inclosure Commissioners to certify in their Annual General Report (or in some special report, as it may be) the expediency of the proposed inclosure (s. 25.). If the Commissioners think that the inclosure may be found to be expedient, they shall refer such application to an Assistant Commissioner to inquire into its expediency; but no application is to be entertained, nor any inquiry proceeded with, unless it shall appear that the persons making the application represent at least *one-third* in value of the interests in the land proposed to be inclosed (s. 25.).

In any proposed inclosure it is to be observed that persons interested in any land not subject to be inclosed, may apply to the Commissioners to submit such land to the operation of the inclosure, who shall so order it if they shall think it beneficial so to do (11 & 12 Vict. c. 99. s. 1.).

Assistant Commissioner's Report.—The Assistant Commissioner is then to report on the application, giving his opinion on the expediency of the inclosure; and if he reports in its

favour he may specify any terms or conditions proper for the protection of public and private interests, and shall point out by a map the place at which allotments may be made for exercise and recreation, and for the labouring poor, if it shall appear to him that such allotments should be made (s. 26.). One of these conditions may be an allotment in land to the lord of the manor, according to his interest or a rentcharge (9 & 10 Vict. c. 70. s. 5.).

The Provisional Order.—The Commissioners are then to embody the conditions of the proposed inclosure in a provisional order under their seal, and to take the consent of parties interested thereto (s. 27.). This provisional order is to set forth the terms and conditions of the inclosure (s. 27.). It may be amended or varied, according to the circumstances of the case (9 & 10 Vict. c. 70. ss. 1—3.).

Report of Commissioners.—The Commissioners are then to cause notice to be given of their intention, having taken these precautions, to certify in their Annual General Report the expediency of the proposed inclosure on the terms expressed in the provisional order, which shall be deposited for the purpose of taking assents and dissents; and if it shall appear that *two-thirds* of the whole interests in the land shall have consented to the terms given in the provisional order, the Commissioners shall in their next General Report certify their opinion that the proposed inclosure would be expedient (s. 27.); and if a supplemental order shall be made by the Commissioners, it is to be deposited in the same manner, and the like consents are to be taken to it as if it were an original order (9 & 10 Vict. c. 70. ss. 1. 3.); and, if a sufficient number of assents are not made to the supplemental provisional order, the Commissioners may suspend proceedings in the inclosure (s. 3.).

When the land to which such application shall relate shall be the waste of any manor, or land within any manor, to the soil of which the lord of such manor shall be entitled in right of his manor, then such lord must give his consent, without which the inclosure cannot proceed (s. 29.).

The Act secures, for the use of the poor, as a condition of the inclosure, an allotment for exercise and recreation, according to

the extent of the population, and if the provisional order does not provide for this, the reason is to be stated by the Commissioners in their Annual General Report (s. 30.); and by s. 31. a similar enactment is made as to allotments for the labouring poor. These allotments may be altered and exchanged for others by an order of the Commissioners (9 & 10 Vict. c. 70. s. 4.); and when these allotments seem no longer necessary or suitable, they may be exchanged for others (15 & 16 Vict. c. 79. s. 21.).

Acts authorising the Inclosure.—These preliminary investigations having been made, the next stage in the proceeding is the Act of Parliament, of which there may be more than one in a Session. In this Act, which is a Public Act (s. 32.), all the inclosures are named, the expediency of which have been certified by the Commissioners in their Annual General Report, and the same are to be proceeded with according to the provisions of the Act, and the terms and conditions of the provisional order.¹

Appointment of Valuer.—Next comes the appointment of the valuer to divide and allot the land, for which purpose the Commissioners are to call a meeting of those interested. The Commissioners may, if they think fit, appoint an Assistant Commissioner to preside at such meeting to take the votes, the majority of which, in number and value, shall bind the minority (s. 33.); and if such majority shall not agree the Commissioners may appoint the valuer (s. 33.).

Instructions to Valuer.—At this meeting, or at some subsequent one, the majority, in number and interest, may resolve on instructions to the valuer, not inconsistent with the terms of the provisional order and the Act, which instructions may be principally as follows:—1. For the formation and widening of public roads and ways; 2. For a supply of stone, gravel, &c., for such roads, and for the formation of public drains and watercourses; 3. For the formation of public ponds; 4. For places of exercise and recreation; 5. For allotments and supply of fuel for the poor; 6. For land for burying ground; 7. For site for church, parsonage house,

¹ The last of these Acts is the one of the present Session, 16 Vict. s. 3.

school, workhouse, or garden to be attached thereto, or for any other purpose of public utility, and *also for raising and payment of all expenses*, incident to such inclosure, *by sale of part of the land proposed to be inclosed*, or by a rate as provided by the Act (s. 34.). Other meetings may be called when necessary for giving further instructions to the valuer, which shall be as valid as if given at the first meeting (12 & 13 Vict. c. 83. s. 3.). Such instructions may be allowed or disallowed by the Commissioners in whole or in part, or such alteration or additions may be made not inconsistent with the terms of the provisional order; and a copy of such instructions, under the seal of the Commissioners, shall be delivered to the valuer, which, with the provisional order, are to be acted on by the valuer (8 & 9 Vict. c. 118. s. 34.).

When the valuer certifies that the value of any allotment if made would not exceed 5*l.*, the Commissioners may direct the valuer to award such person in lieu of such allotment a sum of money, and the same may be raised in the same way that money may be raised for expenses (11 & 12 Vict. c. 99. s. 3.).

Claims.—In settling contested claims an assessor may be appointed by the Commissioners to assist the valuer, who may be any assistant Commissioner whether a barrister or not (s. 35.) (9 & 10 Vict. c. 70. s. 13.). But the alterations in the instructions to the valuer by the Commissioners are not to be acted on unless sanctioned by a majority of the persons interested (s. 36.).

The valuer so appointed is from time to time to hold meetings for the examination of claims and otherwise in the matter of such inclosure, and is to give due notice of such meetings (s. 46.).

At such meetings all persons claiming any common or other right or interest in any land to be inclosed, shall deliver such claims in writing stating the particulars in respect whereof such claims are made. But these claims are relieved as far as possible from all needless technicality; and thus the valuer will be directed to render such claims perfect, and, so far as he can, to supply verbal errors (see 11 & 12 Vict. c. 99. s. 9.); nor is it necessary to make special reference to

the Prescription Act, 2 & 3 Vict. c. 72., to have the benefit of it (15 & 16 Vict. c. 79. s. 20.).

No claim shall be received by the valuer after the last meeting except for some special cause to be allowed by the Commissioner (s. 47.). Under these words, if a proper case is made out, a claim will be received even if made after the last meeting held for the purpose of hearing claims.

The statement of claims is to be deposited at some public place within the parish in which the land to be inclosed shall be situate; and of this fact due notice shall be given, and every person who shall object to a claim shall deliver his objection in writing to the valuer and a copy of such objection at the abode of the claimant. The claims are then to be heard and determined by the valuer, subject to an appeal to the Commissioners (s. 48.). But nothing in the Act shall enable the valuer, or the Commissioners, or any Assistant Commissioner to determine any right between the parties *contrary to actual possession of any such parties* (s. 49.).

Encroachments.—All encroachments and inclosures other than inclosures duly authorised by the custom of any manor of which such land shall be parcel or otherwise, according to law, which shall have been made by any person from any part of the land proposed to be inclosed within twenty years next before the first meeting for examination of claims, whether any rent or acknowledgment shall or shall not have been paid to the lord of the soil, shall be deemed parcel of the land subject to be inclosed and be allotted accordingly. But where it shall appear to the Commissioners just, persons in possession of such encroachments or inclosures shall be allowed to retain such rights and interests as shall appear proper; and such persons may remove all such buildings, fences, and erections as may be on the land (s. 50.). By a subsequent Act encroachers may be removed from the land by a summary proceeding before magistrates, similar to the process for obtaining the possession of tenements (15 & 16 Vict. c. 79. s. 13.). School-houses and erections for charitable or parochial purposes are not to be deemed encroachments (s. 51.); and encroachments of twenty years' standing, which are not to be affected, are to be deemed ancient inclosures,

but not so as to carry right of common or allotment, which might be claimed in respect of ancient inclosures (s. 52., and 10 & 11 Vict. c. 111. s. 3.); and neither the award under the inclosure nor any consents or orders previous thereto shall be taken to divert or prejudice any right in the Crown or of any other person in the lands so inclosed or the minerals under the same (except only rights of common), (10 & 11 Vict. c. 111. s. 3.). And when satisfactory proof shall be given that there has been enjoyment of any right for sixty years next before the first meeting for the examination of claims, such claims may be allowed, although not sustainable at law (s. 54.).

Valuer's schedule.—After the valuer has heard and determined all claims and objections, he shall cause a schedule thereof to be made and deposited, and shall cause notice to be given; and if any person is dissatisfied, the matter determined by the valuer may be reheard by the Commissioner or an Assistant Commissioner, which determination shall be final, unless the party dissatisfied shall try his right by an issue at law (s. 55-58.).

The Commissioners or any Assistant Commissioner may award costs to any person in whose favour any determination shall have been made, to be paid by the person whose claim or objection shall have been disallowed, and the payment may be enforced by distress or by action (s. 59.).

The valuer may set out and make such ponds, ditches, watercourses, embankments, tunnels, and bridges of such extent and form, and enlarge and alter the same as he shall deem necessary, making such satisfaction to the proprietors of such ancient inclosures or land for the damage done as the valuer shall think just, and the expense of repairs, &c. shall be borne by such person as the valuer may direct. But no watercourse is to be turned without the consent of the person interested in the land from which the same may be diverted, or to the prejudice of any person interested therein, without his consent in writing (s. 61.).

The valuer may also, with consent, make drains and watercourses and other necessary works in or on any land other than the land subject to the inclosure, notwithstanding that

it is not in the parish in which the land is situate (15 & 16 Vict. c. 79. s. 2.).

The valuer may also, before he shall proceed to make any of the allotments, set out and make public roads and ways, and widen public roads and ways, in or over the land to be inclosed. But no turnpike road shall be altered without the consent of the trustees. And before any public road shall be discontinued or diverted, the valuer shall fix at each end of the road a notice and issue proper advertisements (s. 62.); and as to this an appeal is given to the Quarter Sessions (s. 63, 64.).

The expenses of making and altering such roads are to be paid in the same manner as the other expenses of the inclosure (s. 66.); and as soon as the public roads set out shall be certified by two justices of the peace they shall be repaired in like manner as other public roads (s. 67.).

The valuer may also set out private roads, and specify how and by whom they are to be repaired; and the grass and herbage arising thereon shall be for the use of such persons as the valuer shall direct, *and in the absence of such direction*, these shall belong to the proprietors of the land next adjoining the roads (s. 68.; see also 11 & 12 Vict. c. 99. ss. 4-7.).

The valuer may, with the sanction of the Commissioners, order the rights of common to be suspended (s. 69.), and may direct the course of husbandry (s. 70.), and give compensation for growing crops (s. 71.). He may also make an allotment for the repair of roads (s. 72.), and for the public purpose already mentioned, or for such others as are expedient (ss. 72-75.). When the rights of common are suspended or extinguished, and allotments entered upon, persons trespassing may be proceeded against before the Justices (11 & 12 Vict. c. 99. s. 10.); and when a person shall have taken possession of an allotment under the direction of the valuer, he may maintain an action for damage done thereto (s. 11.); and when the owner of any allotment neglects to make proper fences, the owner of any other allotment who shall be aggrieved by his neglect, may enter on the allotment, do the necessary work, and recover the costs (s. 12.).

Where persons exercise acts of ownership, the commonable

rights being suspended or extinguished, on allotments directed to be entered upon, they may be proceeded against as for a malicious injury to property (12 & 13 Vict. c. 83. s. 8.).

The lord of the manor is also to receive an allotment in lieu of his right and interest in the soil of his land (s. 76.), or he may receive a rentcharge instead of such allotment (9 & 10 Vict. c. 70. s. 5.); and if his right or interest is estimated exclusive of his interest in the mines or minerals, then the valuer may reserve to the lord such rights (s. 76.).

An allotment may also be made to the lord, with his consent, in lieu of quit rents, chief rents, and heriots, payable out of any old inclosure, in respect of which an allotment would be made (12 & 13 Vict. c. 83. s. 5.).

The residue is to be allotted to the several persons interested therein, after making provision for the expenses of the inclosure, by sale of lands, if the expenses shall be so directed to be paid (s. 77.).

The allotments are to be fenced at the expense of the respective persons to whom the same shall be allotted (s. 83.), and may be made to a purchaser (s. 84.), or to the representatives of parties dying (s. 85.).

Where the freemen or burgesses of any town or place, or any other persons as a class, shall be entitled to rights of common, the valuer may award an allotment to trustees who shall be nominated to represent such class (s. 87.), which allotment may be sold, and the proceeds applied for the benefit of the class of persons entitled (ss. 88, 89.); and other persons having similar rights may be so treated (12 & 13 Vict. c. 83. s. 2.).

Two thirds of the persons interested in land proposed to be inclosed may, with the consent of the Commissioners, sell such land, so that it shall not exceed fifty acres (15 & 16 Vict. c. 79. s. 4.), and, after payment of expenses, may appropriate the surplus purchase-money to the endowment of schools, the construction of bridges, highways, school-houses, drains, watercourses, or any other work whatever of public utility (s. 5.). But the resolutions must be confirmed by the Commissioners (s. 6.), who may vary or disallow them. And in that case a second meeting must be called of the persons interested (s. 7.). If they are confirmed, an award is to

be framed by the Commissioners (s. 9.), which, after confirmation, is not to be impeached (s. 10.).

The Act is not to revoke or alter any will, settlement, uses, or trusts, or prejudice any right of dower or annuity charge on any land to be inclosed; but the land allotted *shall be subject to the same uses and charges* as the several lands in respect whereof such allotment is made would have stood limited and charged in case the same had not been allotted (s. 93.). The land allotted is to be of the same tenure as the land in respect of which it has been allotted; *i. e.*, the land allotted in respect of freehold shall be freehold, and the land allotted in respect of copyhold shall be deemed copyhold, and shall be held of the manor of which the land in respect of which it is allotted was held; but if the lord of the manor consents, the Commissioners may declare that such land shall be freehold (10 & 11 Vict. c. 111. s. 6.); and the land allotted in respect of leasehold shall be held under the same rents and covenants in respect of which it may have been allotted was held, and the remainder or reversion thereof shall be vested in the same lessor (s. 94.).

As soon as the allotments are staked out, the valuer may, after having obtained an order of the Commissioners, direct the same to be entered upon by the persons for whom the same are intended; and thereupon all leases, agreements, and tenancies at rack rent shall cease at such time as the valuer shall direct, so that the landlord shall make a proper compensation to the tenant for any injury sustained by him (s. 95.) (15 & 16 Vict. c. 79. s. 15.).

No seignory franchise or manorial jurisdiction shall be affected by any operation under the Act, except with the consent of the lord (s. 96.). Nor any right to minerals under the land inclosed existing distinct from the property in the surface, and not compensated upon the inclosure (s. 98.).

Any time before the confirmation of the award, the valuer may, with the approbation or by the direction of the Commissioners, alter the allotments, or any of the orders or directions in the inclosure, and may direct in what manner the expense occasioned by the alteration shall be paid (s. 101.).

Valuer's Report.—The next important stage is the Valuer's

REPORT, in which he is to specify all the claims allowed, and all the allotments made, and all roads, ways, and works, and to accompany this by a map (s. 102.). This Report is to be deposited at some convenient place within the parish in which the land to be inclosed shall be situate, for the inspection of all persons interested, and due notice is also to be given of a meeting for the purpose of hearing objections, and the Commissioners may then approve such Report, or cause the allotments and directions therein to be amended as they shall see occasion (s. 103.).

The Report is to be sent to the office of the Commissioners within one month after the division of the land and the staking out of the allotments, with a map annexed; unless such time be extended by the order of the Commissioners; nor without such order may the valuer direct the allotments to be entered upon (15 & 16 Vict. c. 79. s. 15.).

The Award.—After all such directions are disposed of, and such amendments made, the valuer shall draw up on parchment **THE AWARD**, which shall set out all allotments and matters, and shall contain a declaration whether or not all the mines and minerals shall be included in the right and interest of the lords in the soil, which award shall be confirmed by the Commissioners (s. 104.). The award may also contain a declaration as to parish boundaries (12 & 13 Vict. c. 83. s. 1.).

The confirmation of this award is to be conclusive evidence that all the directions of the Act in relation to such award, and to every allotment and matter therein which ought to have been obeyed and performed, have been obeyed and performed, and no such award shall be impeached by reason of any informality therein (s. 105.); and the several allotments shall be in full bar and satisfaction for their several lands, and all other rights not excepted by this Act or by the award; and after the confirmation of the award, or at such earlier time as the valuer shall, with the approbation of the Commissioners, direct, all rights of common and all rights whatever intended to be extinguished, shall cease (s. 106.).

Certain imperfections in the award might be set right within two years after its confirmation, by a supplemental order,

which shall have the same effect as the original award; thus allotments may be subdivided, and the tenure of the allotments distinguished; but the expenses of this order shall be paid by the party applying for it (s. 107.); but see also p. 407.

Regulated Pastures.—In addition to the powers given by the Act to parcel out all the land directed to be inclosed into allotments, the Commissioners may, on the application of persons whose interest shall exceed in value one half of the whole interest in such land, direct such land or any part thereof to be converted into and used as a regulated pasture, to be stocked and depastured in common by the persons interested therein, in proportion to their respective rights (s. 113.), and to carry out these objects, field reeves may be appointed (ss. 116—120.); and any person having stock or animals on any regulated pasture contrary to the regulations, shall forfeit 5*l.* for each head of stock, to be recovered before two justices of the peace, and to be paid to the field reeve (15 & 16 Vict. c. 79. s. 33.).

When land is already occupied as a stinted pasture, the provisions of the Act may be applied to it on the application of the persons interested therein (ss. 121, 122.).

Expenses.—The important point of the expenses of the inclosure, so ruinous under many former inclosure Acts, is thus provided for:—

The allowances and payments made by and to the valuer, which shall have been audited and approved by or under the directions of the Commissioners, and all other expenses of the inclosure (except the expenses of the Commissioners, which are paid by the public out of the Consolidated Fund, and except any expenses which the Commissioners shall order to be otherwise paid), shall be borne by the several persons interested in the land to be inclosed (except the surveyor of highways, churchwardens, and overseers in respect of the allotments to be made to them) in such proportions, and to be paid at such times and places, as the valuer with the approbation of the Commissioners shall direct; and the valuer is to give notice of the shares of such expenses on the church doors, and also by letter to those out of the parish; and he

shall make estimates of all expenses, and raise the amount thereof at such times as he shall, with such approbation, either before or after the confirmation of the award (s. 124.).

These estimates of expenses, before being approved of by the Commissioners, shall be submitted to a meeting of persons interested therein, called after seven days' notice (s. 125.). When any person shall refuse to pay his share of the expenses, the valuer may recover the same, together with lawful interest, by action; or he may levy the same by distress or entry, until such expenses shall be fully paid. But thirty days' notice in writing must be given that any arrear has taken place (s. 126.); and if these means are insufficient, a part of the allotment, or the whole, may be sold to defray the expenses and costs (15 & 16 Vict. c. 79. s. 3.).

When it shall appear, either before or after the confirmation of the award, that the money to arise by any previous rates, for the payment of expenses, shall be insufficient, an additional rate may be made (s. 127.).

The Commissioners having regard to the time, and labour, and expenses of the Assistant Commissioners, and other persons employed in or about the enclosure, may order and declare that a sum be paid to the Commissioners in respect of the salary and expenses of the Assistant Commissioners, and other persons so employed in the inclosure; and the Commissioners shall declare such sum to be charged on the land in such shares as they shall see just, and to be deemed part of the expenses of the inclosure; and when raised, the sum shall be paid into the Exchequer (s. 130.).

Persons attending meetings are to pay their own expenses (s. 131.), but the expenses of witnesses may be paid by the parties interested, under the order of the Commissioners or an assistant Commissioner (s. 132.).

Persons having an estate in an allotment not less than a freehold, and various incapacitated persons, may mortgage their allotments to defray their share of the expenses of the inclosure (s. 133.). But the mortgage money must be paid to the Commissioners, whose receipt shall be a sufficient discharge to the mortgagor (11 & 12 Vict. c. 99. s. 8.). The

same classes of persons may sell a part of their allotments for a similar purpose (s. 135.), and the Commissioners are to receive and apply the purchase-money towards defraying the expense; and the surplus is to be paid to the parties when seized in fee simple (s. 136.), and when not so seized, then, if over 200*l.*, into the Court of Chancery in the usual manner (ss. 137—141.); and see further as to such sales and the application of the purchase-money, 15 & 16 Vict. c. 79. s. 11 & 12.

When land is sold by the valuer for expenses, the purchase-money shall be paid to the Commissioners (s. 142.) who shall convey the lands (s. 143.). A form of conveyance is given in the Schedule to the Act, which is usually adopted.

Further Provisions.—Two copies of the award shall be made and sealed with the seal of the Commissioners, one of which shall be deposited with the clerk of the peace, who shall be entitled to a fee of ten shillings and no more (15 & 16 Vict. c. 79. s. 27.), and the other with the churchwardens of the parish, from which copies or extracts may be made, which are conclusive evidence (s. 146.). Any fraudulent or other error or omission in any award or order may be corrected by the Commissioners (15 & 16 Vict. c. 79. s. 29.).

The Act further provides for the recovery of fines and penalties (s. 159.); for making distresses for sums directed to be levied (ss. 160, 161.), and for giving notices (s. 162.); also for the punishment of false evidence under it (s. 164.), and for the limitation of actions (ss. 165, 166.).

Maps.—The Commissioners may adopt any maps which have been confirmed by the Tithe Commissioners, or any other map they may think proper, and after testing the accuracy of any new map, may certify it under their seal (9 & 10 Vict. c. 70. s. 12.); and the Commissioners may, under particular circumstances, direct that the land, in respect of which the allotments have been made, shall not be comprised in the map annexed to the valuer's report (11 & 12 Vict. c. 99. s. 2.).

Such are the principal provisions of this important series of Acts, by means of which a very considerable improvement in the landed property of the country has already taken place, and which is going on with great rapidity, certainty and pre-

cision. Many nice points necessarily arise in thus working out an inclosure, but the cheap, speedy, and accessible Tribunal appointed, disposes of them to the general satisfaction of all concerned.

ART. XII.—PROSPECTS OF LAW AMENDMENT.

SINCE our last Number there have been important changes in the political world, with which of course we are wholly unconcerned, except in so far as they affect the legal world. But before touching upon them, in this view, we must note what was done by the late Ministers, both in justice to them and to the subject.

Lord St. Leonards received at our hands the commendation to which he was well entitled for his full adoption of the great plan framed and reported on by the Chancery Commission. He had the greater merit in this, because it was well known that his own opinion had been exceedingly adverse to the fundamental principle of the plan, the abolition of the Master's Office; and because, after struggling against it, when he yielded, he did so with the greatest fairness and sincerity, giving the fullest effect to the whole measure. The abolition, the corner stone of the new structure, had been originally, as we had formerly occasion to show from the evidence both before the Commissioners and the House of Lords Committee, recommended in detail, as the only possible remedy for the evils of Chancery Procedure, among others by one of the most experienced Masters (Mr. Brougham) ten years before, and no reason whatever can be assigned for the continuance of these great evils during that long period of time. But the Commissioners had themselves framed most ably the provisions to accompany that measure, and Lord St. Leonards made valuable additions to these provisions in the orders which he issued under the powers of the Act. He has therefore deserved well of the great cause of Law Amendment, and must take a distinguished place among

reforming Chancellors, a body far more select and respectable than numerous.

He did not, however, stop here. He, in the short Session which began before the Ministry was changed, brought in Bills for further improving the proceedings in Chancery; and though some of his propositions are of more than doubtful merit, some also have great value.

The late Government deserve equal praise for taking up the important subject of the Criminal Code or Digest. In our last Number we published Lord Brougham's Letter to Lord Denman, in which he stated, that both Lord Lyndhurst and himself had come round to the opinion of Mr. B. Ker and his colleagues in the Commission, in favour of passing the Digest, not in one Act but piecemeal, each chapter forming a separate Act, and ultimately reducing the whole into one. This letter bore date in August, and it is now well known that nearly two months before it was made public, the Government had resolved to pursue this course, giving instructions to have the first of the Bills prepared, digesting the Law upon offences against the person, together with the preliminary chapter referring to all offences. We think no one can doubt that for much of this important service to the Law, we are indebted to the influence of Lord Lyndhurst. But the merit of the late Government is not the less conspicuous; and it must be admitted to stand in very advantageous contrast with the dilatory, if not absolutely hostile course pursued by their predecessors. In truth, the conduct of the Whig Ministry in relation to the Digest, much as it has been condemned, has never received even adequate censure.

We wish we could award the same praise to the Derby Government in relation to the most important of all subjects connected with the Law, the County Courts. Some little was effected by the Act of last Session, but the issuing of a Commission on those Courts, as well as the Bankrupt Courts, has been apparently refused, certainly withheld; and without that we can have no hope of the system being placed upon a solid foundation, and of the other measures being brought forward with effect which are absolutely necessary to secure

in the Superior Courts the benefits that should naturally flow from the Local Judicature. We own it gives us pain to note in passing the disposition shown by some Judges of these Superior Courts to interfere with the good working of the new system. The maxim, *Boni judicis est ampliare jurisdictionem*, seems to have been taken too literally for the guide in certain recent proceedings. One most eminent Judge, for example, certified for costs in a case of false imprisonment brought before him most unnecessarily,—an action which could have been most fitly tried in the County Court, and in which the defendant, having a verdict of five pounds against him, will probably be ruined by having to pay a hundred pounds in costs. If attorneys feel secure of having such certificates where there is every probability of the plaintiff recovering damages, it is certain that the jurisdiction of the County Courts is at an end. The Judge who grants the certificate thus easily, makes the suitor and the public pay very dear for the favour which he may acquire from the Profession; and if it be said that the Superior Courts are underworked, the answer is obvious. Let the Judges go circuit more frequently, if the reform of the procedure cannot bring the costs of resorting to them so low as that their tribunals may have the power of standing the competition with the inferior ones. In the case to which we have referred, the costs in the County Courts would not have exceeded five or six pounds, and the action would have been tried at once, instead of waiting for the sittings at Guildhall, perhaps eight or ten months.

We perceive that notices have been given in the House of Commons of bringing forward, after the recess, both the general question of Law Digest, Statute and Common, and that of a Court of Review in Criminal Cases; in other words, extending the late Act to motions for new trials (after conviction, we presume, is alone meant).

Upon the former subjects we need scarcely say how heartily we wish success to these efforts. But we must be excused for expressing a hope that both the honourable gentlemen, one an English the other an Irish member, have examined the learned Reports of the Common Law Commissioners on

the digesting of the Law. Those Commissioners have really gone so fully into the whole question, that it would be both unfair towards them, and most injurious to the success of the attempt, were their labours not well considered, and their suggestions carefully attended to.

Touching the other subject, we have some little repugnance to the course taken of hanging so important a measure upon a trial which has, from the singularity of its circumstances, excited so great a degree of popular feeling. The learned Counsel for the party convicted is the person who gives the notice, and no doubt its connection with the conviction will be avowed. We give no opinion upon the merits of that case; but we think it our bounden duty to warn the community against encouraging appeals to the public upon the event of criminal trials.¹

But on these and all other changes in the Law much must of course depend upon the composition and the prospects of the new or Coalition Government. The friends of Law Amendment are, naturally enough, greatly relieved by the omission of Lord Truro, in whom they had found much too often a persevering adversary. But it would be most unjust to join the exaggerated attacks upon him, and the kind of clamour to which he has been exposed. It is not only untrue, it is the very reverse of the truth, to allege, as has been constantly done, that he was against the Chancery Reforms. He had originally, but not more than his successor (indeed not so much), felt averse to the propositions of the Commissioners in some essential particulars. He had, by an unfortunate indistinctness in explaining his views, become classed with opponents of the Report. But before his retirement from office, nay, before there was the least expectation of that event, he had entirely adopted the Report, had applied his united acuteness and industry to preparing the

¹ In all the discussions which we have seen on this trial, we have found no notice taken of one remarkable and very discreditable circumstance. At eleven o'clock one, at least, of the jury was decidedly opposed to the conviction; but before twelve he joined in the verdict. Is it conceivable that a man should thus act against his opinion where life was at stake, for fear of being inclosed all night?

Bills which were to give it effect, and had left those Bills in such a state that, had he not quitted office, they would have been passed much earlier than they ultimately were. The details of this matter were fully stated by one of the Commissioners in his place, Sir W. P. Wood, now Vice-Chancellor, then Solicitor-General. Justice, as well to Lord Truro as to the Government he belonged to, requires that this important fact should not be lost sight of. The supporters of the succeeding Government were very ready—indeed, they still continue very willing—to give it the credit of the Chancery Reform. But the members of that Government have never pretended to more than the praise of adopting the measure which they found prepared, and of aiding in working out its detailed provisions. It is truly disgusting to see the attempts made for party purposes, and especially for election purposes, to claim for them the credit of these great measures—in the face of the most distinct statement by the Ministers themselves that they were the measures of their predecessors. Thus (Hansard, vol. cxxi. p. 946.) we find Lord St. Leonards fairly and honestly telling the real truth. “He wished most carefully to guard himself from the imputation, that he was taking credit to himself for those measures. Though the Government was ready to adopt those measures, they could not take credit for originating them.” This was said 12th March 1852, in his statement of the course which the new Government intended to pursue on Law Amendment; and on the 10th of May, he said, on presenting the Bill itself, “It has been drawn up in strict conformity to the recommendations of the Commissioners.” (Hansard, vol. cxxi. p. 419.) So that those Ministers considered it an imputation upon them to pretend the measures were theirs, which their utterly unscrupulous or grossly ignorant partisans do not hesitate to claim for them. Lord Lyndhurst, the patron of that Government, said on the same occasion that “he had examined the Bill as printed, and found that its provisions substantially carried the recommendations of the Commissioners into effect.” (Hansard, vol. cxxi. p. 552.)

It is impossible to mark, as we have now been doing historically, the labours of the Chancery Commissioners, and not

feel deep regret at the loss which the cause of Law Amendment has sustained, as well as the Legal Profession, by the death of Sir James Parker; but we might also lament the loss to the cause of Law Amendment from the Master of the Rolls and Sir W. P. Wood having both quitted the House of Commons. Their presence in that assembly was invaluable; and however much we may be disposed to approve of judges being excluded, yet where the judicial duties can never by possibility be interfered with by political considerations, like those of the Common Law Judges and of the Admiralty, there might seem a ground for excepting from the rule of exclusion that Chancery Judge at least who has at all times been a member of the House of Commons. Every friend of sound legislation would entirely rejoice in the return to his place there of Sir J. Romilly. Possibly a higher promotion, either in his case, or that of Sir W. P. Wood, may lead to their presence in the other house.

We have referred to Lord Truro no longer holding the Great Seal, and to the very exaggerated attacks upon him as connected with that circumstance. But the chief of the Government with which he was connected, has been the object of attacks and of a clamour among his own party followers, we will not say "a little louder, but as empty quite," for it was a good deal more unfounded. There was a ground of complaint in both instances, but less on that of Lord J. Russell; and he has wisely and patriotically yielded to the tide which he could not stem, consenting to occupy a subordinate place, and continuing his services to the country, and even to the party at whose hands he had met with such ungrateful treatment.

But upon Lord Truro retiring from office, it is fit that those conducting a Law Journal should not confine their attention to the position which he held in relation to the great measures of Law Amendment. He was a judge as well as a minister and a legislator; and his judicial merits have been much underrated, partly from factious motives, and partly because he came into a Court where he never had been a practitioner. Whoever attended to his proceedings, and in whatever branch of the profession, admitted at once

that he possessed in a rare degree the qualities of a judge; for he was filled with but one desire, that of thoroughly sifting the merits of each case, doing the most ample justice between the parties, and satisfying all that nothing whatever had been overlooked. A more laborious and conscientious judge never sat in any Court. His legal knowledge and his acuteness never failed him, and the only fault ever laid to his charge, was an over-anxious, a too elaborate dwelling upon all the points of each argument, without due regard to their relative importance. This, which was only a good quality carried to excess, somewhat impeded his progress; and while his judgments never failed to give satisfaction, they were occasionally delayed. On his quitting the Great Seal, some seven or eight remained to be given in causes which he had fully heard, and as in two or three of these the parties did not consent to take the judgments which he was ready to give out of office, rehearings were the consequence,—a very exaggerated statement was circulated of the number of judgments in arrear, and an Act was passed, which had long been in contemplation, to enable a retiring Chancellor to give judgments within six weeks from his leaving the Court. When Lord St. Leonards resigned, he had no judgments in arrear, and this has been made the ground of the most absurd statements, as if such a thing had never happened before, or as if it were any very eminent merit. The reputation of that able and learned Judge stands upon much higher grounds, but he has been extolled as affording a great contrast to his immediate predecessor, and, indeed, to all his predecessors. We have seen it said in one publication, that such a thing “never before had happened within the memory of man;” in another it was said, “*mirabile dictu*, he left no judgment in arrear.” Suppose it to be true, which it certainly is not, that this was the first time the Great Seal had ever been resigned without the necessity of rehearings, the whole merit consists in the mere accident of the date. If the Chancellor goes out soon after the long vacation, and is the most dilatory man that ever sat in the Court, he cannot possibly have the least difficulty in clearing off his judgments. Take the instance of Lord Cottenham, who, in his second Chancellorship, fell into

the great error (as we have formerly stated in this Journal) of delaying his judgments, under the pressure of business, until Parliament rose, and, having prepared them during the vacation, gave them, as Lord Truro also did, in Michaelmas Term. If Lord Cottenham went out in July he was almost certain to leave several cases undecided; not many, indeed, because the custom is (wholly unknown to the eulogists whom we have cited) to give, with or without any reasons, the judgments to the Registrar, and therefore those cases only remain unfinished in which the Judge has not made up his mind. Lord Cottenham, therefore, would in July have probably given, before retiring, some eight or ten judgments by handing them to the Registrar, about as many with his reasons in Court, and perhaps half as many would remain upon which he required further examination of the papers and reference to his notes; and these, unless all the parties consented, must be heard and determined by his successor, the Act not having passed in his time. But if he resigned in November, or, as Lord St. Leonards did, early in December, then all the cases he had heard before the long vacation were disposed of on the reassembling of the Court; and there only remained the few which he had heard in Michaelmas Term. It was therefore highly improbable that he should leave any one undecided, any more than we believe Lord Brougham did, who resigned at the end of that term, and Lord Lyndhurst, who, by mere accident, left two causes undisposed of at the same season of the judicial year. The same panegyrists of Lord St. Leonards also forgot that neither Lord Cottenham nor Lord Truro had the benefit of Lords Justices, in whom was vested all the authority and jurisdiction of the Chancellor, and who, of course, prevented both the arrear of judgments, by leaving so very few matters for the Chancellor to hear, and who prevented that other and far more important arrear which the ignorant and thoughtless persons, of whose party eulogies we are speaking, confound with the arrear of judgments,—we mean what is usually called the arrear of Chancery; that is, the mass of causes which stand for hearing, not causes heard and waiting judgment:

with regard to the latter, there is another most important, indeed a decisive circumstance, which they who have been contrasting Lord St. Leonards with Lords Cottenham and Truro, never for a moment consider,—we mean the length of time during which the several Chancellors had been in office; for assuredly upon that depends the number of causes heard, and of judgments likely to be in arrear. Now Lord St. Leonards was ten months Chancellor, of which not above six are to be reckoned, the other four being Easter and autumn vacations. Lord Cottenham's first Chancellorship lasted forty-three months (making the same deduction for vacations and also for Christmas), his second about thirty months; Lord Truro's twelve months. He therefore was twice as long, his predecessor five times as long in his second, and seven times as long in his first Chancellorship; and it is therefore most absurd to compare their arrear of judgments, with that which might accumulate in so much shorter a period. There is a French proverb which Sir Samuel Romilly was fond of citing, that "you diminish whatever you exaggerate." And it has rarely happened that we have seen a more remarkable instance of this than in the extravagant and wholly misplaced praise to which we are referring. The injustice is great, not only with those to whom the comparison is so falsely made, but to the object of the injudicious praise; "from him is taken that he hath." But it is our duty to protect him from this injustice, and to state that the real merits of Lord St. Leonards are very great notwithstanding these exaggerations, which only have the tendency to deprive him of the praise so justly his due. We have borne a willing testimony to his services as a promoter of Law Amendment; as a judge his merits were also great, but the same pretended friends but real enemies (*pessimum inimicorum genus, laudatores*) have sought to exalt him by an invidious comparison with his immediate predecessor. That he showed a greater power of quickly dispatching business is not to be denied; but it was also to be remarked that the exemplary patience of Lord Truro, and the close attention which he bestowed upon all the arguments addressed to him, if sometimes leading to delay through needless discussion, could never leave occasion

for complaints that anything had been overlooked, or give rise to the remark, that some judges are too quick as others are too slow.

Between these two extremes we trust that the new Chancellor, Lord Cranworth, will successfully steer; and we also hope that he will show himself the unhesitating friend of Law Amendment. That he has ample opportunity of fully exerting himself in this direction is manifest. We showed in our last Number, the great proportion which the judicial force of the Court bears to what it was in former times. In estimating the services and judging the merits of successive Chancellors, this vast increase is never to be lost sight of; but so is it ever to be borne in mind when we are considering the Chancellor's power of acting as a Minister of Justice. Lord St. Leonards had the benefit of seven Puisne Judges to assist him in keeping down the arrear of business, or as we showed in our last Number, in doing justice to Lord Eldon, there existed five times the judicial force in the present day. Lord Cranworth has the same benefit, and therefore, not only can he without any difficulty prevent any arrear in the Court, but he has ample time for considering and promoting the measures still required to place the Law, both Common, Civil, and Equitable, upon a right footing. The place of Vice Chancellor has been filled up very hastily, as we think, for the present at least, unnecessarily; because there are now more Judges in the Court than the business requires; and, therefore, until it is seen that the late changes increase the amount of business, there was not the least occasion to appoint a successor to Sir George Turner. That course, however, has been taken: and when the Lords Justices are empowered to take original causes (if indeed they are not already so empowered) there will be no necessity whatever for the Lord Chancellor to sit in his Court during any considerable portion of the Parliamentary year. From Lord Cranworth's ample leisure then, with his long experience both in Courts of Equity and of Common Law, the friends of Legal Improvement have the greatest right to indulge the most sanguine hopes. We trust such a pleasant anticipation will not be disappointed, though we confess we should have

augured more confidently had less haste been shown in filling up the late vacancy. The abolition of the Masters, no doubt, is the excuse given for this step. But that it is, at least for the present, a false one, we can have no doubt.¹

ART. XIII.—THE LAW REFORM BUDGETS OF THE
LATE AND PRESENT GOVERNMENTS.

1. *The Substance of the Speech of the Lord Chancellor [St. Leonard's] in the House of Lords, Nov. 16. 1852.* Sweet, 1852.
2. *Confusion worse confounded; or the Statutes at Large in 1852.* By GRAHAM WILLISON, Esq., one of Her Majesty's Counsel. 1852.
3. *Elements of Jurisprudence.* Being Selections from Dumont's "Digest of the Works of Bentham." Translated by THOMAS D. INGRAM, Law Scholar, Queen's College, Belfast. With an Introduction, by Professor HANCOCK. Dublin: 1852.

¹ Since this Article was written, we have taken some pains to ascertain the number of matters which stood for judgment by the various Chancellors on the day of their resignation of the Great Seal, from the time of Lord Eldon's first Chancellorship downwards; and believe the following *precis* to be correct:—

| | Date of Resignation of Great Seal. | Number of Matters heard, and in which Judgment had not been given on the Day of Resignation. |
|-----------------------------|--|--|
| Lord Eldon - - - - | Feb. 7. 1806 | None. |
| Lord Erskine - - - - | April 1. 1807 | None. |
| Lord Eldon - - - - | May 2. 1827 | 26 |
| Lord Lyndhurst - - - - | Nov. 22. 1830 | 5 |
| Lord Brougham - - - - | Nov. 22. 1834 | None. |
| Lord Lyndhurst - - - - | April 23. 1835 | None. |
| Lords Commissioners - - - - | Jan. 16. 1836 | None. |
| Lord Cottenham - - - - | Sept. 3. 1841 | None. |
| Lord Lyndhurst - - - - | July 6. 1846 | 4 |
| Lord Cottenham - - - - | June 19. 1850 | None. |
| Lords Commissioners - - - - | July 15. 1850 | None. |
| Lord Truro - - - - | March 1. 1852 | 6 |
| Lord St. Leonards - - - - | Dec. 28. 1852 | None. |

4. *First Report of the Commissioners appointed by His Excellency the Governor-in-Chief, to inquire into and report upon a System of Procedure suited to the Supreme Court of New Zealand.* 1852.
5. *Speech of the Attorney-General for Ireland [Napier], on introducing the new Code for regulating the Relation of Landlord and Tenant in Ireland.* Nov. 22. 1852.

THE cause of Law Reform at last has triumphed. It has first prevailed in the late Administration, actively progressive in nothing else, and it is now firmly enthroned by the present Government. It will be remembered by our readers that we gave the Government of Lord Derby all the support in our power, so far as their Law Reform policy went. "Mere general professions," we said, "will not serve our purpose, but if our children are well nourished we shall not raise any objection to the colour of the nurse."¹ We considered that their conduct was to be carefully watched, but so long as they really brought in or furthered good measures, we thought they were to be supported. Let us, therefore, consider to what praise they are fairly entitled, and what were their shortcomings.²

For a correct conclusion as to this we have ample materials given us by the late Lord Chancellor himself, who, in his speech on the 16th of November last, made a statement as to what had been and what was to be done by the late Government; and here we heartily commend the practice which Lord St. Leonards, so far as we remember, has been the first to introduce,—that the Lord Chancellor should have his Budget, as the Chancellor of the Exchequer has his, and that early in the Session a statement should be made of what is intended to be done. The Lord Chancellor thus fairly took upon himself the functions of a Minister of Justice, and we hope that this practice may be followed by his successors.

What then was done by the late Administration, and what

¹ 16 L. R. p. 8., Art. "Lord Derby's Policy as to Law Reform."

² This is also considered in the previous Article with greater authority than the writer of the present Article can pretend to; but it is not useless, we trust, to view this subject from more quarters than one. — ED.

was promised to be done, and what was omitted to be done, and what was declared against? All these are important points to consider.

The three most important Acts passed are thus described by Lord St. Leonards: —

“ One Act was for the abolition of the office of Master in Chancery, and for introducing an altogether new system of Chamber practice with regard to matters which, up to that time, had been prosecuted by the Masters in their own Chambers. The next Act was for the Improvement of the Jurisdiction in Equity; and the third Act was called the Suitors in Chancery Relief Act; and it certainly did afford a great relief, by the reduction of salaries and the abolition of useless and unnecessary offices.” (P. 3.).

But much was left to be worked out by Orders for supplying the deficiencies in the Acts; and to the preparation of these Orders the Lord Chancellor gave his attention, and here he did good service.

“ I can assure your Lordships, therefore, that my vacation has been principally occupied in a species of legislation — sometimes with and sometimes without the assistance of my learned colleagues — in order to supply what was necessary to give full effect to these Acts of Parliament. My Lords, they are now in full operation; and I think I can assure your Lordships, from what I have already seen, that they will fully effect everything which the country and Parliament had in view. And I think I may venture to assert that the celerity with which matters will be decided in Chancery will be such as to make the old proverb entirely forgotten, and to lead to the introduction of a new one. I think there is no Court in this country in which questions of property will be decided with such rapidity as there — and by rapidity I do not mean haste, which above all other things is to be deprecated in the administration of justice; I mean really good speed — speed so far as is consistent with the most mature deliberation; and that such speed can now be given to matters coming before the Court of Chancery, I hope to show your Lordships before I sit down, as well as that the expense may yet be greatly diminished, so as to render that Court, and every portion of it, at once rapid in its operation and truly cheap to the suitor.” (P. 4.).

This is very well, and we trust that the effect of these Acts and Orders is not overstated.

It will be seen that the Lord Chancellor does not claim the merit of originating these measures. He had, indeed, on a previous occasion expressly disclaimed it.¹ He is fairly entitled, however, to that of having carried them through, and having bestowed much labour in completing the details. His Lordship has long been known as a ready and accomplished draftsman, and all this capacity for such a task he freely bestowed. There is, however, it must be admitted, a wide difference between the faculty which originated the plans and that which simply worked out the details, as the present Solicitor General (Mr. Bethell) observed, with perfect truth, in his speech at Aylesbury on the 6th of January last: "They found ready for the sickle a crop of measures of Legal Reform for which they had not ploughed, for which they had not sown, but for which others had laboured; and their merit was this, that they had promptly put the sickle into the standing corn and gathered home into their own garners that which had been sown and matured and ripened without any industry or merit of their own. All these things had been prepared ready for their hands, and I give them credit for being quick enough to appropriate them, and for their skill, agility, and adroitness in carrying those measures into effect. With regard to any thing else done by these gentlemen, they undoubtedly, so far as the late Lord Chancellor was concerned, desired to remove a number of impediments and obstructions which still remain in the way of the easy, ready, and economical dispensation of justice. But there are still left for the consideration of their successors many very great and important reforms in the law."—*Morning Chronicle*, Jan. 7. 1853.

So far then for the late reforms in Chancery, the exact position and history of which has been already authoritatively discussed in these pages.²

The Lord Chancellor then justly took credit for the very

¹ See Hansard, vol. cxix. p. 900., and *antè*, p. 412.

² See 16 L. R. p. 431., Art. "Law Reforms of the last Session."

valuable alteration effected by him of transferring the salaries of several Judges of the Court from the Suitors to the Consolidated Fund, and also took the right distinction between contentious and administrative suits.

“ And so, unquestionably, the administration of justice ought to be paid for by the public funds, and not by the funds of the suitors. But then there is this clear distinction : the costs of the administration of justice, properly speaking, ought undoubtedly to be paid by the country ; but the costs of the administration of the property of a party within the Court ought not to be paid by the public. Every man ought to have a right to go into the Court itself free from expense, if it may be, and to have the decision of the Judge. But, if he has accounts to be taken — if he has estates to be guarded and watched, and kept in order, he is no more entitled to have the expense of that paid for him in Court, than he would be if the operation had taken place out of Court. Keeping in mind that essential distinction, I must call your Lordships’ attention a little to the state of the funds, as I shall have occasion afterwards to call your Lordships’ particular attention to the operations relating to them.” (P. 7.)

Then he gave a clear account of the Suitors’ Fund and the Suitors’ Fee Fund ; and we like this all the better because the more the statement looks like a Budget the better ; we hope to see the time when the suitor may as easily complain when he is taxed a pound too much for justice as he can now for an overcharge for house-tax.

“ There are two funds upon which the Court draws for sums for which it has occasion. One is called the Suitors’ Fund, and the other the Suitors’ Fee Fund. The Suitors’ Fund arises in this way — there are in the Court sums of money, sometimes of a large amount, which the persons interested in them never require to be invested. The Court, therefore under the authority of various Acts of Parliament, has been in the habit of itself investing from time to time that portion of the suitors’ ‘ unemployed cash,’ as it is called, which the suitor has not called for or required to be invested on his account. The consequence of the party not requiring it to be invested is, that of course he cannot be entitled to the dividends upon that which he has not had invested, and he is not liable to any loss ; but he can demand the amount simply of his cash whenever he thinks proper to do so. The dividends on the stock thus

procured are partly applied by the Court in payment of the salaries of officers and expenses of the Court, and the surplus of those dividends is again invested on a separate account, though as part of the same fund. Nearly 4,000,000*l.* has been invested in this way, and the sums standing on these two accounts constitute what is called the Suitors' Fund; and the result is, that at this time there is a fund producing an income of 111,000*l.* and a fraction, which is appropriated to the payment of the expenses of the Court, and of the administration of justice. Now, my Lords, the charges which by Parliament have been thrown upon this fund amount to 48,320*l.* a year. The annual dividend of the fund is 111,843*l.*; that leaves a surplus of 63,523*l.*, which by the Act of last Session — the Suitors' in Chancery Relief Act — was directed to be carried over to the next fund, that is, the Suitors' Fee Fund. My Lords, the Suitors' Fee Fund is a fund — as the very name of it intimates — which arises from fees imposed by the authority of Parliament, and payable by the suitors. The balance of 63,523*l.* came in aid of that fund, and the sum which this year will have to be provided for in respect of charges upon the Fee Fund will be 157,450*l.* Then, if you take the balance which is to be carried to the credit of the Fee Fund, 63,523*l.*, that will leave an amount of 93,927*l.* to be levied upon all the suitors in the Court of Chancery. Now, my Lords, I have no occasion to tell your Lordships that that is a very large sum; yet it is a small sum compared with the actual business done. My Lords, the amount of fees levied last year was 133,842*l.* The estimated amount, I have told your Lordships, of the fees this year, is 93,241*l.*; that is, a saving of 40,601*l.*; and then there is to be added to that a sum of 3838*l.* for fees hitherto received by the officers for their own use, which have been abolished, and which the suitors will not have to pay. That makes a sum of 44,439*l.* which would be the saving in the year. But, my Lords, the Court has received copy money; it has had to copy documents, and has charged a certain amount per folio as copy money, and that sum altogether has produced 10,000*l.* a year. The solicitors have complained very much of this. They thought it was taking their own proper business from them, and they could do it better as between themselves and their clients, if it were left to them. My Lords, it is now left to them, and they will have the benefit of it. The solicitors are themselves to furnish the copies, the expense of which will, as heretofore, amount to 10,000*l.* a year. Your Lordships will see it is not a saving to the suitors, because the suitors will still have to pay for copies; but it is not a sum raised by the

Court in any manner upon fees which the Court imposes. The result is, that taking that 10,000*l.* off the 44,439*l.*, because the suitors will still have to pay it, there is a difference of 34,439*l.* in favour of the suitors between the costs to be paid in the coming year by the general body of suitors, and the costs paid in last year." (P. 7—9.)

All this is good and clear, and highly creditable to Lord St. Leonards. He then adverted to some proposed improvements in the Accountant General's Office, and referring to a recommendation of a Committee of the House of Commons, for the purpose of declaring that he entirely differed from it, he passed to the duty of the Court of Chancery as a trustee. This had been thus alluded to in the Report of the Law Amendment Society on the Management of Property by the Court of Chancery¹:—"The Court is in fact not responsible for the execution of many of the first duties of other trustees. Not only is it usually slow to hand over the funds to its suitors, but also in many cases the talent is buried in the earth, and restored after many years, at all events not increased in value, to its owner. Without a special order, money paid into the Court is not invested at interest for the benefit of those entitled to it."

Lord St. Leonards took pretty much the same view:—

"The Court of Chancery itself never permits the trustee of a fund to derive any benefit from that fund. If he were to say, 'This money, of which I am trustee, I have invested for my own benefit, taking the corresponding risk,' the Court would, without any hesitation, declare it a breach of trust, and compel him to give up all the benefit which he might have received. Now, the Court acts differently with this fund; for, being itself a guardian and trustee of these moneys, because they are not required to be invested, the Court does not therefore decline to invest them; but the Court does invest them, and the interest and dividends are appropriated by it to its own purposes. The argument in favour of this nature, that the Court acts as banker of the suitors, and, as ordinarily bankers are entitled to employ a balance left in their hands, so the Court itself is entitled to use for the benefit of the

¹ Printed 8 L. R., p. 87. Compare the account of the Suitors' Fund and Fee Fund given in this Report with that given by Lord St. Leonards.

suitors generally the money which is thus intrusted to it. There is, no doubt, something in that argument; but I propose to adopt the following plan:—That for the future any unemployed cash shall be laid out by the Court when it is not required to be invested, and the Court shall have the benefit of that investment for two years, treating the Court as a banker for that purpose; and if at the end of two years there shall not be any requisition not to lay out the money, the party entitled shall have, *as from that period*, the benefit and risk of the past investments. Very often this unemployed cash is not invested, owing to the neglect of other parties having no personal interest in it,—a neglect of which the persons having such an interest, and who are thereby deprived of dividends to which they are entitled, have cause to complain. I believe that the course which I have suggested, will meet the justice of the case without any inconvenience.” (P. 14.)

Of all this we entirely approve. There is nothing very new, but these are all safe and practical alterations.

He then passed to the Ecclesiastical Courts, and stated that the Government had added to the Equity Commission, Mr. Rolt, Sir John Dodson, Dr. Lushington, and Dr. Harding, “the object being not only that the inquiries already commenced [as to the Court of Chancery] should be prosecuted, but that there should be an inquiry into the working of the jurisdiction in testamentary matters in the different Courts of the country.” “It is a great misfortune,” added his Lordship, “that a man’s will has to be subjected to the jurisdiction of different tribunals whose principles of procedure cannot be reconciled. There have been many cases in which great hardship has resulted from the variety of jurisdictions” (p. 17.). And after noticing the case of *Dew v. Clark*, he went on thus:—

“This is a state of things which is discreditable to the country, and ought not to be allowed to continue. There ought to be one plain rule by which the proceedings of all Courts should be guided, and the Government have thought it their duty to see whether some means cannot be found of bringing more into harmony on this subject the different powers of the different Courts. It is of no use, however, attempting to disguise that a more extended investigation into the working of the Ecclesiastical Courts must follow at no distant period.” (P. 18.)

We are satisfied that the instructions to the Equity Commission must go sufficiently far and that the present jurisdiction of the Ecclesiastical Courts must be absorbed in that of the other Courts, which must be clothed with complete and conjoined Law and Equity powers to deal with testamentary matters.

The Solicitor General, indeed, seems to point to this, and to take a bold and enlightened grasp of the whole subject. "One of the great banes of this country," he said, in the memorable speech already alluded to, "is the separation of its judicial institutions—the great variety of its Courts. There are Courts of Law, Courts of Equity, Courts Spiritual, Courts of Admiralty, and a variety of other judicial institutions. Great difficulty, great trouble, great expense arise from that diversity of jurisdiction. It appears to me—and I speak individually—it appears to me most desirable that there should be a consolidation of those jurisdictions. With reference to the Ecclesiastical Courts I think it most essential that they should be absorbed into one universal source of jurisdiction, and that they should no longer stand apart as distinct tribunals, not amenable to the general laws, with a dispensation and practice of their own, but be governed by the same rules that govern the general administration of justice in Westminster Hall."

This is indeed cheering language, coming from such a quarter, and satisfies us that the true principles as to this question must ere long prevail.

The Lord Chancellor then went on to Lunacy, and, so far as he was pleased to communicate them, we approve of the proposed alterations. He wished to prevent unnecessary references to the Master in lunacy, to dispense with juries in certain cases when they were obviously unnecessary; to substitute, in certain cases, a percentage on the estates of lunatics for the fees now paid; to dispense with the *confirmation* of reports when undisputed, and to render the proceedings in small cases less expensive. All these are proper and useful points to be attended to.

Then, as to Bankruptcy also, the Lord Chancellor wished to improve the incomes of the official assignees; to repeal the

provision of the Bankrupt Act which allows the Commissioners to give class certificates, and to prevent parties first employing the Court and then withdrawing from it and settling matters privately.

Lord St. Leonards then discussed a proposition, which our readers will find treated of in a separate Article¹, whether provincial bankruptcies are best confided to the Country Commissioners or to the County Court Judges, and his Lordship has come to a different conclusion from that arrived at by our correspondent, and prefers the Country Commissioners, to whom he would also give "jurisdiction under what are called the dead men's clauses;" thus recognising the plan so long contended for by Mr. T. T. à Becket, and noticed by us in these pages in reviewing his amusing pamphlet, "*Difficulties of a Law Reformer.*"² Mr. à Becket is now, we believe, in New South Wales gathering, we trust, both gold and reputation, and we waft him our good wishes, with the assurance that, sooner or later, a true Law Reform will be brought to light, and we are certain that there is no better investment than a virgin vein of this kind.

The Lord Chancellor then went on to another subject as follows: —

"Solicitors are now permitted to appear as advocates before the Commissioners. I propose to put the same restriction as is now put upon attorneys under the County Courts Act. That is, my Lords, I object to the existence of the class called attorney-advocates. I do not object to a man's attorney arguing his case for him, but I do object to an attorney being turned into a barrister, and acting as an advocate. There is no fair play in that. I desire to see the profession stand upon its proper basis. I wish the barrister not to trench upon the province of the attorney, nor the attorney upon the province of the barrister. Let each stand in his own place. Depend upon it, my Lords, if the system which has so long prevailed be broken in upon, great evils will ensue. It will necessarily lower the character of the Bar. Whether it will elevate the character of attorneys, I will not stay to determine; but, at any rate, there must be equality." (P. 28.)

And then his Lordship thus alluded to another point: —

¹ Art. VII.

² 11 L. R. p. 79.

"Your Lordships had, in the course of last Session, to decide whether you would continue the restriction upon counsel from acting in the County Courts without attorneys, or whether you would leave the etiquette of the profession and the honour of the Bar to maintain things as they have hitherto existed. It so happened that the decision of that question, if I may say so, devolved upon myself. My noble and learned Friends were divided in opinion, two and two, and as the matter was left by the House to the decision of the Law Lords, it necessarily fell to the fifth to give the casting vote, if I may call it so, upon the question. I did give that vote with great reluctance in favour of repealing the law which prohibited counsel from acting without attorneys; but, while I did so, I took care expressly to state, that I gave that vote upon the distinct statement that attorneys had threatened the Bar that if they took business in the County Courts, they should not have business elsewhere. I meant to leave it, therefore, to the honour of the Bar to act as they had always acted, not intending to open the door at all, unless there be an absolute necessity for it, to the practice of barristers acting without the intervention of attorneys—a practice, in my view, highly objectionable, and one which I should be the last person to countenance. Certain barristers, however, I regret to hear, have since then taken upon themselves to decide that they will thus act without attorneys. That is a course of proceeding, my Lords, which cannot be too highly reprobated. I am far from saying that, in the present state of the law, the Bar, as a body, may not properly meet and consider what it becomes them in their station to do. But if any such serious change in the long-established usage of the Bar is to be made, it ought at any rate to be made with the concurrence of a large majority; and I entirely object to any small number, or even to any considerable number, taking upon themselves to act contrary to the general rule of the profession, now so long established." (P. 28, 29.)

We think it right to give these opinions of the late Lord Chancellor as deserving great attention; and we shall content ourselves with saying that we were no parties to the late movement of certain barristers to which he alludes, nor do we approve of the manner in which it was made, which we need not say had not in any way the sanction of the Law Amendment Society. Without expressing our concurrence with the opinion of Lord St. Leonards on these points, we will add

his concluding warning as to this, in which we do fully concur : —

“My Lords, the Bar at the present moment is in a state of transition, and I would recommend everybody having any voice or any influence in this matter to consider this point, not to mention any other, where—if you allow the Bar to lower its own station or dignity—you are to look for learned persons to occupy your benches and carry on the administration of justice.” (P. 29, 30.)

A step of the kind alluded to should have been taken with some deliberation, and, at all events, on full notice to all persons who had entertained the matter, which, we apprehend, was not attempted to be given. We are thus forced to allude to this subject, and expressly reserve all our opinions previously expressed on this subject, under the belief that the time will come when they can and will be acted on efficiently and usefully, as well to the profession as the public, and this, perhaps, sooner than some of our readers may suppose. It is in dealings with property that the way lies most open for a change which might lead to the most successful results.

We now come to the most questionable part of Lord St. Leonards' speech. He thus alludes to the Digest of the Criminal Law. He could hardly do less, after Lord Derby's promise at the close of last Session (see 15 L. R. p. 447.), than state that the Government intended to proceed with “measures founded on the existing Reports.” But we are truly grieved to find his Lordship giving utterance to the following truly Eldonian strain : —

“I am, as my noble and learned Friend well knows, no friend to codification in general. But, if that principle can be properly applied in any case, it surely may be so in the case of Criminal Law. Even there, however, we must proceed with much caution, with regard as well to the substance as to the form of the Digest. My noble and learned Friend, I observe from a printed letter of his, seems to think that we should not attempt to improve or alter the subject, but take the propositions as we find them. My Lords, unless we are careful, we may collect a set of bad treatises and give them a binding effect. Valuable treatises are now resorted to by the Judges for information, but they are not bound by them;

they can, therefore, extract the principle, and adapt and mould the relief as justice may require. But if effect be given to like treatises as statute-law, the Judges must follow them implicitly, and thus great difficulty will arise: for it will be dangerous to allow the Judges to depart from the rule as digested, and yet without that power it would constantly be found necessary to resort to Parliament to amend the law, than which nothing can be more prejudicial. I propose, therefore, without attempting anything like the *Code Napoléon*—for it is impossible for us with our system of legislation to revise the law in the manner which the laws of France were discussed and revised before binding effect was given to the Code—to correct any anomaly or error which we discover, and to make the Digest as accurate in point of Law as if we were passing enactments in the ordinary way, although it is manifestly hopeless to expect the same accuracy in all the details of a vast subject as if we were dealing with only a branch of it. It may, after all, be a dangerous experiment, and it must not be considered as a pledge on the part of the Government to proceed beyond the Digest of the Criminal Law.” (P. 30, 31.)

Now this fills us, to the extent of Lord St. Leonards’ influence, which is justly considerable, with dismay. We will not attempt to argue against the exploded errors contained in the above extract from the Address.¹ It only brings us to the point where we began. We have here before us what the late Lord Chancellor would have done had he remained in office; and giving him ample credit for every thing he proposes, we will ask any of our Law-reforming readers,—and who is not now a Law Reformer—whether he can rest satisfied with his Lordship’s Law Budget for the Session 1853? No attempt to remedy the anomalous state of our conflicting and often antagonistic jurisdictions in Law and Equity; no proposal to consolidate even our Statute Law, or introduce a better mode of drawing Acts of Parliament; and CODIFICATION EXPRESSLY DECLARED AGAINST. This declaration was, in fact, inconsistent with the conduct of the Government with

¹ Any person who has any doubts on this subject would do well to peruse the Article of Sir S. Romilly on Bentham’s Work on Codification, in the “Edinburgh Review,” opportunely reprinted in the publication of Dr. Hancock, noticed at the head of this Article.

respect to the Criminal Code, for which they deserve praise, and which has been elsewhere noticed.¹

But was there no other omission in the speech of Lord St. Leonards even more important than any of these? Alas ! in the whole of this minute and elaborate statement we find not one word relating to LAND. Surely it is admitted by all that the law relating to Land requires reform — the expense and delay attending its transfer — the length and perplexity of the practice relating to its title — the large rate of interest now paid on mortgages, and the enormous cost of their transfer — the want, in fact, of some REGISTRY OF TITLES, and some cheap and accessible tribunal to dispose of all the difficulties which now surround almost all dealings with real property. Surely we might have reasonably expected, when a great real property lawyer held the Great Seal, he would have turned some small part of his attention to a remedy for some of these admitted evils, that he would have applied some portion of his great knowledge for the benefit of the suffering land-owner. But every department of the whole field of Law Reform seems to have been explored save this. Not one suggestion, not an allusion, was made to the great and undeniable difficulties which, we might have thought, from his long experience as a conveyancer, and his great practical skill thence derived, he would first have applied his mind. But here it would seem that no hope was held out; no change of opinion was announced; no modification of his former views was to be allowed. This was indeed a serious matter, especially as the settled conviction of a Lord Chancellor, who is not supposed to entertain, with any remarkable favour, the suggestions of any other Law Reformer; who loved “no brother near the throne,” and who spoke, in this respect, the sentiments of the Cabinet, of whose interference it was well known he was sensitive to a fault, and among whom it would have been difficult to find any one competent to speak with the requisite knowledge, authority, and influence on this subject. The present Solicitor-General, fortunately, who doubtless spake not without good reason, has not left us in

¹ See *antè*, Art. XII., p. 409.

doubt as to his sentiments, only echoing indeed the opinion expressed by Lord John Russell, on his re-election for the City of London, when he declared himself in favour of "measures which would free the transfer of land from those trammels which now surround it." Mr. Bethell, of course, spake with more precision: —

"There is one alteration which, if it could be properly effected, would confer one of the greatest possible boons on the landed interest — I mean an alteration of the Law affecting the transfer of land. I hope to see the day when land will become an article of commerce, and be as easily and readily transferred as consols, and become at once the purchaser's property. There will undoubtedly be great opposition to such a reform, and probably no stronger objector to such a scheme will be found than the late Lord Chancellor; but that opposition may be met and overcome, and I trust before long I shall be able to congratulate you on the accomplishment of so desirable an object. I wish you to understand that I am now merely expressing my own opinion. I think a registry might be established, which would allow any man desirous of buying a house, or an estate, at once to ascertain the owner who had the capacity to sell. In such a case it would be merely necessary to ascertain the identity of the party, and a great portion of the expenses which are now unavoidable in sales and mortgages would be got rid of."

Now here we have an adherence to the true principles avowed. Let us build on this foundation. Let us be content to do little at first; but let that little be well and wisely done. *We* also hope to see the day when land shall be transferred as easily as stock in the Funds; and we believe it to be practicable, as has been more than once¹ shown in these pages. More than this; the ingenuity and practical knowledge of the Law Reforming part of the profession are now turned in this direction; and we know enough of the feeling respecting this plan to be able to say that it would be hailed by the great body of the profession, more especially by the solicitors.

Now we are of no politics in these matters: we were quite willing to further Lord Derby's Government so long as

¹ 12 L. R., pp. 69. 405.; 13 L. R., p. 1.; and many other Articles.

it would help us. But if the one Government opposes and the other favours all our plans, — plans which we believe are for the interest of all, — it is not surprising that we should so far prefer the latter. The Solicitor-General has boldly and promptly pronounced his opinion. Nor has the Attorney-General held back ; although he has not thought it necessary to enter into this subject with such particularity, we may refer to all the former life of the present Lord Chancellor for satisfactory evidence that no obstruction will come from him. More especially, in all questions relating to land, we expect from his Lordship the most valuable assistance. He won his spurs in the House of Lords as a Law Reformer by the skilful and conciliatory manner in which, last Session, he carried a very difficult and important Bill — the Copyhold Enfranchisement Measure — which has introduced the compulsory principle to be acted on on the 1st of July next ; and we do confidently expect some relief from the innumerable evils which now surround the transfer of land ; and if Lord Cranworth will simply act as respects freeholds on the principles carried in that Act as to copyholds, much will be done. If we can get short and cheap titles, ready modes of mortgaging and transferring mortgages, and effectual control over conveyancer's costs, we shall do well ; if a register of titles, we shall do better.

It is admitted by all, that no such opportunity ever existed for achieving great things in the Reform of the Law as in the Session now about to open. We trust it will be well employed — we have glanced at what may be done — we believe that the present Government have the will — we are sure they have the power. We have sincere pleasure in finding that many of those to whom we very recently referred as connected both with Parliament and the Society for the Amendment of the Law, are now placed in high places, and able to influence, if not to control, the measures of Government. Where could we find better men for this purpose than the following, all members of the Commons : —

Sir A. E. COCKBURN, Attorney-General.

Mr. BETHELL, Solicitor-General.

Mr. MONCREIFF, Lord-Advocate.

Mr. C. VILLIERS, Judge-Advocate.

Mr. BAINES, Chairman of Poor Law.

Mr. FITZROY, Under-Secretary of the Home
Department.

Mr. LOWE, Secretary of the Board of Control.

Are we to lose the services of these eminent men because they are in their several departments clothed with power and responsibility? We think not. We believe that the cause of Law Amendment will receive from them that aid which already they have always gladly given when out of office. We believe that we have at length a Government willing and able both to take extensive views on this subject, and to supply the necessary details. We believe that their course will be bold, and therefore wise, but that it will be also safe and prudent; and let us now glance at some points which may be most readily carried, and on which effective operations may be at once commenced.

Digest of Statute and Common Law.—There is abundant evidence in this Number¹ that the country is ripe for some step in the direction of a consolidation of our Law. The expression of opinion as well legal as commercial by the large and important Conference which assembled on the 16th of Nov. last, has plainly established this fact. The only doubt is whether it would be advisable to proceed step by step and first to consolidate the whole Statute Law of the three kingdoms, and then to deal with the Common Law, or whether it is not better boldly to assert the principle of CODIFICATION, and take measures for commencing this great work. There are, no doubt, good reasons for either course; and we are satisfied that they will be well weighed; but the necessity for consolidating and assimilating the Law is now universally admitted. Probably it might be advisable to combine any proceedings that might be taken to meet this necessity, and give it a twofold object. The country would thus be more easily reconciled to taking the proper steps; for thus truly does Mr. Willmore, in his able pamphlet, state the case. Eager as the present Parliament is for Law

¹ See *antè*, Art. X.

Reform, and loud as is the cry through the country, we dare say some penny wise and pound foolish persons will grumble at the cost of providing the necessary remedy.

“ I propose that the empire of Great Britain should set apart the sum of about 10,000*l.* a-year for the purpose of improving her laws. Cannot she afford it for a purpose of such stupendous importance? It is about the amount of one man’s sinecures, lately much discussed; far less than is often realised to the discoverer of some happy novelty in chemistry or mechanics. We pay one gentleman alone as much for looking after the laws of the Hindoos, and we do well; but surely the laws of the whole British people deserve at least as much care and expense. There are about twenty-one millions of us, spending, according to the late lamented Mr. Porter, very many times that amount in voluntary taxation, that is, in useless or mischievous luxuries. Cannot we afford it? All hail to them who planned and executed the Crystal Palace. It is no disparagement to say that, perhaps with less cost, a nobler, brighter, ever-enduring, ever-profitting monument might have been built in our laws. We have spent much treasure, and, alas! the lives of many noble and brave seamen, in seeking a north-west passage which no one believes to exist, and through which no one could pass even if it did. How much have we paid, and are paying now, for the splendid and uncomfortable palace in which we pen up our sickening legislators? Are we justified in neglecting the weightier matters of the Law itself, while we care so much for the mere place where it is manufactured; in spending nothing upon the kernel, while we are so lavish upon the shell? In preparing and making clean the outside of the platter while we allow such shocking messes to be made within? Cannot we afford it? Yet we give 18,000*l.* for Correggios, we put up a railing before the British Museum for 14,000*l.* We build up, pull down, and build up again, our marble arch. Who can tell how much that wandering, lumpish unsightliness has cost us? Let us admire and cultivate Art as it deserves, attribute all that is due to the humanising as well as materially useful influences of Science; yet, in doing these things, this other being left undone, are we much wiser than that naked king of Madagascar who decorated himself with a cocked hat and knee-buckles before he had a shirt to his back? I do not object to what we did and gave, still give and do, towards extinguishing black slavery, nor dwell on what we suffer from our white man’s grave at Sierra Leone; because

the object is noble and worthy ; and because, though by our deeds and gifts we may have aggravated the sorrows of the middle passage, multiplied slavery in other states, enriched foreign slaveholders, ruined our own fellow-countrymen the West Indian proprietors, and perhaps are restoring the islands to the condition in which Columbus found them ; still some excellent people think we have not done too much towards the attainment of that object. Yet there is *one* matter, to say the least, as to which all are agreed. We are the people who purchase so dearly that transcendent compound of suffering and evil in South Africa. We are they who periodically spend *millions* that we may shoot and be shot by miserable greasy Caffres, with blue beads round their necks. While we are guilty of this costly extravagance of absurdity, it is hardly consistent to urge that we cannot afford a modest 10,000*l.* a-year for such a purpose ; and I will not assume that it can be urged."

And Mr. Willmore thus states his plan in detail : —

"I now proceed to state in detail the plan proposed. It consists in the creation of a Board of three Commissioners, who shall not be members of either House of Parliament : their duties to be divided into two distinct branches, one relating to future, the other to past legislation.¹ As to the first, a copy of every Bill relating to public matters, which shall have passed the first reading in either House of Parliament, shall be forthwith laid before the Board ; and it shall be their duty, before the expiration of one month after such copy shall have been laid before them, unless longer time be allowed by leave of the House in which the Bill was introduced, to prepare a report upon the Bill, stating their

¹ "The Romans, they appointed ten men, who were to collect or recal all former laws, and to set forth those twelve tables so much of all men commended.'

'In Athens they had Sexviri, which were *standing commissioners* to watch and to discern what laws waxed improper for the time ; and what new law did in any branch cross a former law, and so ex officio propounded their repeals. . . . And Lewis the Ninth, King of France, did the like in reforming his laws.'—(*Bacon, First Speech in Parliament.*) Lord Bacon himself, with several of the best lawyers of his day, was for some time occupied upon the same work. But unfortunately not being formed into a *standing commission*, their efforts were fruitless. In his 55th Aphorism he prescribes that, after the example of the Athenians, at certain fixed intervals, contradictions in the laws shall be removed by laws to be first inspected and prepared by men delegated for that purpose, and then introduced to the Legislature, who, by their votes, may then determine and fix what they choose to have done."

opinion as to the purport and probable effect of it, *so far as that opinion can be formed from the fair construction of its words.* In this report especial regard shall be had to existing legislation upon the subject; and the Board shall wholly abstain from any reference to objects or motives which may be supposed to have operated in bringing forward the Bill. The Board shall also suggest such alterations, additions, or omissions in the Bill as to them may seem to render it more effective for the attainment of its ostensible purpose; and, if they think it expedient, may propose an entirely new draft of the Bill. The report, together with a statement of the suggestions, and a copy of the new draft, if any, to be laid on the table of the House when the Bill comes on for a second reading. The promoter of the Bill to have the option of adopting the suggestions and draft, either, or any of them, if he shall think fit. After the Bill shall have received the approval of both House, previous to its becoming law, it shall be again subjected to the inspection of the Board, lest any inaccuracies of language should have crept in during its progress through Parliament. In case of any emergency requiring the immediate application of an Act of Parliament, the Crown to have the power of dispensing with the intervention of the Board.

“ With regard to past legislation, the Board shall employ the whole of their time, not occupied with future legislation, in preparing Bills for the repeal and consolidation of all the existing Statute Law, neither adding nor altering anything (such being properly the province of the Legislature itself). Except in cases where some subject may require immediate attention, the Board shall employ themselves upon the statutes of the earliest reign in which there are any extant. And taking each statute in succession, shall pursue through all the subsequent reigns up to the present time, the thread of legislation upon the subject of that statute; embodying in one Bill all the existing Statute Law upon such subject. The Bill at full length, and also the titles of all the Acts proposed to be repealed, shall be published in the ‘Gazette,’ at least six months previous to its introduction into the Legislature. By this course abundant time will be afforded for the deliberation and criticism both of individuals and societies throughout the nation. And the Legislature itself may afterwards adopt any improvements, either in substance or style, which may be thereby elicited. The Bill to be brought before the Legislature by the Ministry for the time being.¹ I further propose that when,

¹ “ After writing the above, I found that the following very similar suggestions

during the progress of the work, all the known statutes of any preceding reign shall have become wholly consolidated and re-enacted or repealed, there shall be a declaration of Parliament, which shall receive the assent of the Crown, that no statute passed in such reign shall have any further force or effect whatever.¹ So that by degrees, and, as I hope, at no unreasonably distant date, the whole of our now existing Statute Law may either be consolidated and re-enacted in a compact, connected, intelligible form, or else wholly repealed, swept away, abolished, and put out of sight. And I pray with all my heart that this noble work, than 'the which,' Bacon thought, 'nothing would tend more to the praise'² of Elizabeth, may be accomplished under the auspices of Victoria, who, to so many claims upon our affection peculiarly her own, will then add a further one in her new character of a better, an English and constitutional Justinian."

Transfer of Land.—The state of the Law on this subject amounts to a national disgrace; and we are not surprised that our American sisters call upon us to remove it.³ But

are made by Barrington, in p. 503. of the Appendix to his book on Statutes. I value the confirmation which mine receive from his too much to say, 'Pe-reant qui ante nos nostra dixere.' . . . 'It is proposed that two or more barristers should be appointed, who from year to year might make a report to the Privy Council, as likewise to the Lord Chancellor, the Master of the Rolls, and the Twelve Judges, of a certain number of statutes which should either be repealed or reduced into one consistent Act. It may be proper also that they should at the same time transmit such statutes as they propose to substitute in the room of those which seem liable to objection. There will then be the whole vacation for the consideration of such intended alterations, and if they should be approved of they might pass into laws the subsequent Session of Parliament.' See also the able papers presented to Parliament in 1838, drawn up by Mr. Arthur Symonds. They embody the substance of the reports of several committees on the state of the Statute Law, recommending the appointment of permanent revisers of statutes, which recommendation is strongly supported by Mr. Symonds himself. They also contain very useful suggestions as to the mode of drawing Bills which have been since partially acted upon. And see the Report of a Committee of the Law Amendment Society, 1 L. R., p. 134."

¹ "By the 79th article of Locke's Code for Carolina, it is provided that all Acts of Parliament shall, at the end of 100 years after they have been enacted, become null and void without any repeal.

² "First Speech in Parliament. In his 59th Aphorism he calls such a work, "Opus heroicum."

³ The address of the American women to their sisters of England, at the commencement of the present year, states, among other grievances affecting England, the following:—"You owe to them (the poor) every facility with

this is now so obvious to all, that the only question is the mode in which it shall be done; and we do not despair of a solution in the present Session. We invite attention to the Bill which Mr. Drummond proposes to introduce, which (although we are not acquainted with its details) we are satisfied will be right in principle; and we trust it may receive the support of the Government, unless, indeed, they introduce a Bill of their own.

Lastly, Consolidation of Jurisdictions and Fusion of Law and Equity.—To the paper which commences this Number, we refer with melancholy¹ satisfaction as a masterly argument for thus assimilating the Legal Procedure of the chief nations of the Anglo-Saxon race. We shall be soon outstripped by our colonial possessions. In the settlement which is to take place with the East India Company in the ensuing Session, we shall be surprised if the principle of FUSION be not introduced into the Courts of the Presidencies; and the Judges of New Zealand have led the way by recommending it for that Colony,—a course which, we have reason to think, will be followed by the whole of the Australian group. Indeed, it is obvious that in the Colonies, Courts having a conjoined jurisdiction in Law and Equity must be advantageous, and could be easily introduced both as to Judges and Practitioners, to say nothing of relieving the admiral on the station from his duties as Chancellor. But in the mother country this great question must be satisfactorily disposed of. Whatever subject is to be first proceeded with, this, remaining unsettled, will be a stumbling-block. Consolidation of Laws — Codification — Transfer of Land — Ecclesiastical Courts — all these are to be brought before Parliament; but we submit that none of them can be settled satisfactorily

which you can surround their conflicts amid the obstacles of life;—facility to obtain land," &c. &c.

¹ We are permitted to mention that we owe this valuable contribution to a proper study of Legal Procedure to Mr. Smillie, late Advocate-General of South Australia. Soon after its completion, he proceeded to Italy, in bad health, but died at Paris on the 11th of December. He was the son of the late Matthew Smillie, solicitor, at Leith, and has left a widow and children to deplore their loss. He was much esteemed by all who knew him, and we consider his early death a great loss to the cause of scientific Law Reform.

without first dealing with the question of whether complete justice in every matter should not be done by giving every Judge in the land the conjoined powers at present vested in various Judicatures. These are the questions now ripe for settlement, and to which we hope and believe the present Government will direct its attention, and which will be brought before the Parliament now about to assemble.

We have endeavoured, impartially, to weigh the merits of the two Governments with respect to the Amendment of the Law; and we trust that that now in power will not disappoint the expectations which we have formed of them. We cannot say that we regret the resignation of the Great Seal by Lord St. Leonards; and it is only fair to his successor to state, that we have reason to believe that the stories which were circulated, of his being requested by the Earl of Aberdeen to continue in office, had no foundation whatever. If such offer had been made, we do not doubt that it would not have been accepted; but no such offer, as we believe, was made.

It is fair to add, in mentioning the respective merits of the two administrations, that much was to be expected from the Irish law officers of the Earl of Derby. The Attorney-General (Mr. Napier) brought in four Bills for the settlement of the land question in that country, which deserve great attention. The Solicitor-General brought in a Bill which adopted as its basis the principle of a fusion of Law and Equity. It is impossible that these Bills can be sacrificed by the change of administration; the only consequence of this will surely be that their extension and applicability to England will be carefully considered by the present Law Authorities of the Crown.

Jan. 28. 1853.

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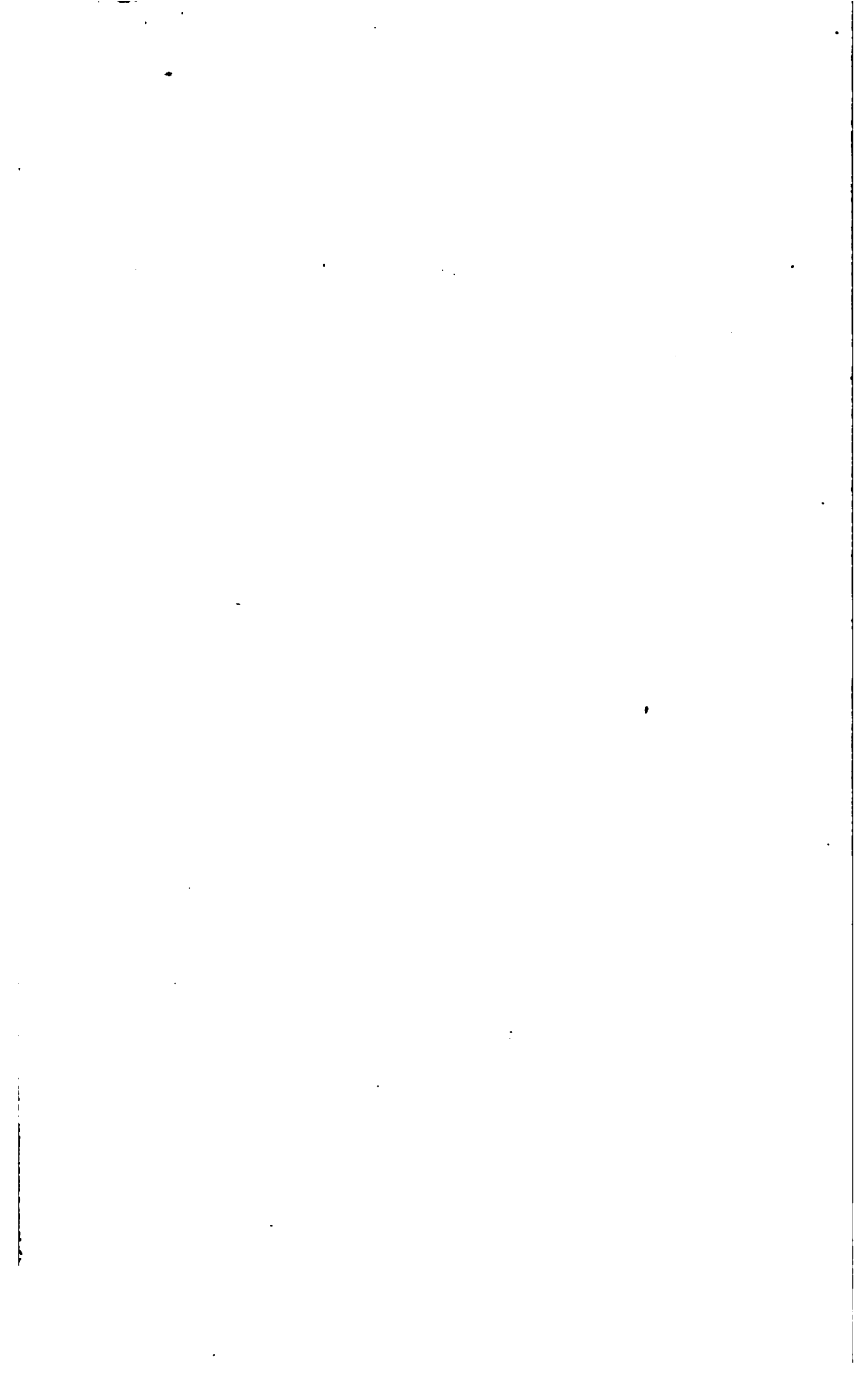
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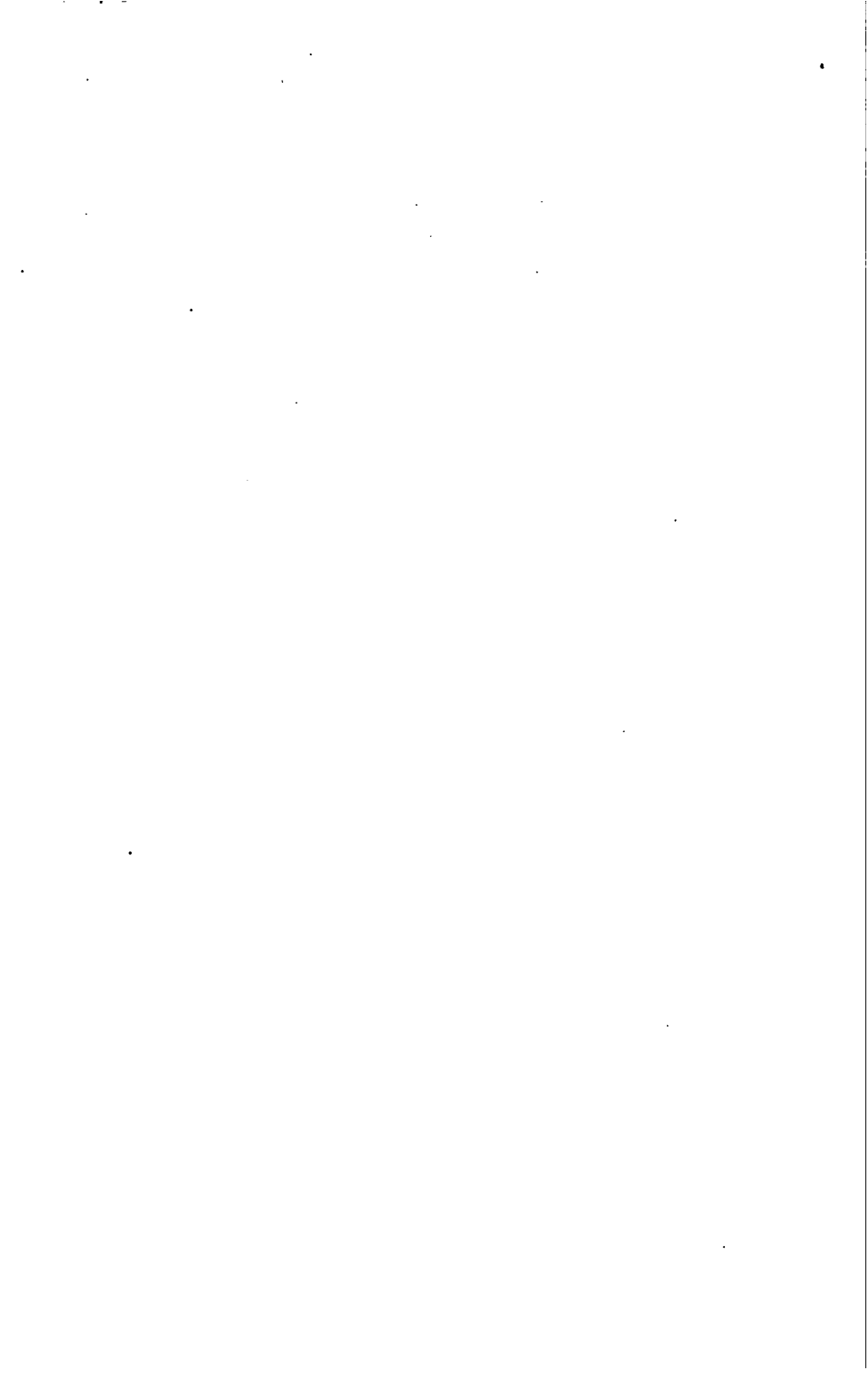
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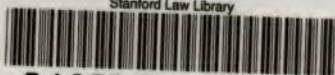








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